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No.

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Content-based Regulation Issue

Whether, on its face or as applied, a regulatory recruiting rule of a secondary school athletic association that operates under color of state law, *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n,* 531 U.S. 288 (2001), which bans the use of "undue influence" on any student "by any person connected, or not connected" with a school to secure or retain a student "for athletic purposes" and which rule, further, has been interpreted in controlling guidelines blanketly to prohibit, *per se*, all school-initiated, targeted communication with or solicitation of prospective students and, more specifically, to prohibit "[d]iscussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff," App. at 7-B, and therefore is "directed to communicative activity as such," *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775 (2002)(slip op. at 6), is a viewpoint-based (*see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)) or a content-based regulation subject to strict scrutiny under the First Amendment (as the district court held), or whether, as the court of appeals held, such a rule is a "manner" restriction subject to intermediate scrutiny because, by faulty analogy to this Court's "secondary effects" cases, the ban contained in the recruiting rule "does not constitute a total ban on communications between secondary schools and prospective students regarding athletic programs" and allows other modalities of communication for schools to provide prospective students with information "about the academic, athletic, and spiritual aspects of the educational experience," *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n,* 262 F.3d 543, 552 (6th Cir. 2001). *See Reno v. ACLU*, 521 U.S. 844, 879-80 (1997).

2. The Excessive Discretion Issue

Whether, as the district court held, use of the terms "undue influence" and, as a definition of that term, "appropriate or normal," in the recruiting rule, especially when linked to a totally discretionary and standardless administrative waiver authority, App. at 6-D, vest unbridled discretion in regulatory officials in violation of the First Amendment. *See Forsyth County v. The Nationalist Movment*, 505 U.S. 123, 129-33 & n.10 (1992); *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775 (2002)(slip op. at 7-9).

3. The Facial Challenge Issue

Whether, as the court of appeals held, in a facial challenge based on the First Amendment, "the challenger must establish that no set of circumstances exists under which the [challenged provision] would be valid," *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 555 (6th Cir. 2001)(quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), or whether a plaintiff in a First Amendment context can facially challenge a regulation that, in validly regulating non-expression, infringes on "a substantial amount of speech that is constitutionally protected," or a regulation that "delegates overly broad discretion to the decisionmaker." *See Forsyth County v. The Nationalist Movment*, 505 U.S. 123, 129-30 (1992).

4. The "Pure Speech" Issue

Whether, under *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1761 (2001), or the anti-solicitation cases, a state regulatory entity can bar and punish "the fact of communication," not just some "separately identifiable conduct," *Cohen v.*

California, 403 U.S. 15, 18 (1971), when that communication provides truthful information about underlying conduct that is itself permitted under the regulatory regime.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brentwood Academy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1A-25A), upon remand from this Court's decision, *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n,* 531 U.S. 288 (2001), was entered on August 23, 2001, and is reported at 262 F.3d 543 (6th Cir. 2001). The order of the court of appeals denying the petition for rehearing *en banc* was entered on October 29, 2001. App. 1-C. The opinion of the United States District Court for the Middle District of Tennessee, granting Petitioner's motion for partial summary judgment and issuing a permanent injunction, is reported at 13 F. Supp.2d 670 (M.D. Tenn. 1998) (App. 3B-61B).

JURISDICTION

The court of appeals entered its judgment on August 23, 2001. Petitioner timely filed a petition for rehearing *en banc* on September 6, 2001. On October 29, 2001, the court of appeals issued its order denying Petitioner's petition for rehearing *en banc.* App. 1-C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 are set forth in Appendix F.

STATEMENT OF THE CASE

The constitutional issue in this matter is Petitioner's facial and as applied First Amendment free speech challenge to the Recruiting Rule of the Tennessee Secondary School Athletic Association (TSSAA). The case is brought under 42 U.S.C. §1983, and federal jurisdiction exists under 28 U.S.C. §§1331 and 1343.

Petitioner is a co-educational, independent, college-preparatory school. Like its counterparts in most states, Respondent TSSAA is a nominally private association composed primarily of public schools and local public school officials and governed exclusively by public high school principals, assistant principals or certain qualified public school superintendents. TSSAA coordinates, supervises, and regulates interscholastic athletic competition among both public and private high schools in Tennessee. In a proceeding before this Court last Term, the regulatory conduct of TSSAA was held to constitute state action, thereby subjecting that conduct to the strictures of the First and Fourteenth Amendments. *See Brentwood Academy v. TSSAA,* 531 U.S. 288 (2001)

TSSAA's Recruiting Rule, which is similar to comparable rules in most states, bars independent schools from taking the initiative in contacting or communicating with prospective student-athletes individually. While the general prohibition contained in the rule bars the use of "undue influence" for "athletic purposes," interpretive guidelines bar school-initiated, targeted "contact" for any reason. App. at 6-10-B.

The district court held that the Recruiting Rule was a content-based regulation of non-commercial speech that violated the First Amendment both facially and as applied. The district court also held that the use of terms "undue influence" and "normal and appropriate" in the Recruiting Rule conferred "unbridled discretion to penalize those

expressing points of view with which it disagrees," and "permits the TSSAA to engage in arbitrary and discriminatory enforcement – precisely the claim made by Brentwood Academy in this case." App. at 55-B & n.27. That "unbridled discretion" facially violated the First Amendment under *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 129-33 & n.10 (1992).

In reversing, the Court of Appeals for the Sixth Circuit held that the Recruiting Rule was a content-neutral "manner" regulation subject to intermediate scrutiny. 262 F.3d at 552. Even though the Recruiting Rule prohibits school-initiated targeted communication or solicitation, thereby "foreclos[ing] an entire medium of expression" (a "particular concern" of this Court's decisions, *see Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)), the court of appeals characterized the rule and its anti-solicitation features as a "limitation on the manner in which secondary schools can communicate with students about their athletic programs." 262 F.3d at 552. *But see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628-32 (1979)(holding that solicitation is a form of expression within the protection of the First Amendment); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788 (1988)(restrictions on solicitation subject to "standard First Amendment analysis," *i.e.*, strict scrutiny). Since "other outlet[s] for providing ... information to prospective students" are available, the court of appeals held, the Recruiting Rule is not content-based regulation and is subject to intermediate rather than strict scrutiny. 262 F.3d at 552. *But see Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993)(determination of whether a regulation of speech is content-based is made "regardless of whether or not it leaves open ample alternative channels of communication" and availability of such alternative channels of communication cannot serve as the basis for characterizing a regulation of speech as a "manner restriction"); *Riley*, 487 U.S. at 791 ("[G]overnment, even

with the purest motives, may not substitute its judgment as to how best to speak for that of speakers and listeners").

The court of appeals also rejected the facial claim under the excessive-discretion principle, criticizing the district court for not "focusing on how the rule was applied to Brentwood." 262 F.3d at 556. Contrary to the express teaching of *Forsyth County* – that a facial challenge on the ground of excessive decisionmaking discretion turns not "on the facts surrounding any particular ... decision" but on whether "there is anything in the [regulation] preventing" the improper exercise of discretion, 505 U.S. at 133 n.10 – the court of appeals focused on how the rule was applied in this specific case, thereby rejecting the facial excessive-discretion challenge. *But see Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)(allowing facial First Amendment challenge when "recognized First Amendment protections of parties not before the Court," such as prospective students who have First Amendment interests as listeners, will be "significantly compromise[d]").

The Recruiting Rule. TSSAA's Recruiting Rule bars the use of "undue influence" on a student or the parents or guardians of a student "to secure or retain a student for athletic purposes." The rule's prohibition extends to students "with or without an athletic record" and applies to "any person connected, or not connected, with the school," App. at 6-B, apparently applying to barbers or other local merchants unaffiliated with a school.

The term "undue influence" is defined as "exceeding what is appropriate or normal." App. at 6-B. The terms "appropriate or normal" are not defined. App. at 38-B. Instead, the Recruiting Rule sets forth a number of examples of conduct that is considered "undue influence" *per se*.

These *per se* rules flatly prohibit independent schools from taking the initiative in communicating with or contacting prospective student-athletes individually for any reason. App. at 40-B. Private or parochial schools may not

contact students enrolled at public schools; public schools may not contact private school students. App. at 8-B.

The flat ban also restricts who can speak on behalf of a school, stating that "a coach may not contact a student or his or her parents prior to his [or her] enrollment in the school."[1] App. at 6-B. Further, the rule restricts who can discuss financial aid with prospective students. No member of a coaching staff may discuss need-based financial aid with any prospective student "until the student has enrolled in school (attended 3 days of school)." App. at 7-B. As the district court found, "any school representative, including a member of the coaching staff, is prohibited from making an 'initial contact' with prospective student-athletes outside the 'feeder pattern' for ***any*** reason" until the student has attended 3 days of school. App. at 40-B (emphasis in original). The court of appeals acknowledged that the Recruiting Rule was a "prohibition on coaches, coaching staff, and school representatives from initiating contact with ... students for the purposes of recruiting student athletes." 262 F.3d at 552. The district court found that the Recruiting Rule's "ban has the effect of preventing ***any*** influence on a student, not just 'undue' influence." App. at 48-B (emphasis in original).

TSSAA by-laws provide discretion to the Executive Director to waive the Recruiting Rule "when in his opinion the rule fails to accomplish [its] purpose." App. at 6-D. The *per se* rules provide specific examples of impermissible activity but do not limit the discretion of TSSAA in enforcing the underlying "undue influence" standard. The *per se* prohibitions are also subject to discretionary waiver by the Executive Director. The district court found that TSSAA "retains unbridled discretion" to "use the Recruiting Rule to arbitrarily suppress speech in violation of the First Amendment." App. at 55-B.

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[1] *Cf. First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785 (1978)(A state may not dictate "the subjects about which persons may speak" or control the "speakers who may address a public issue").

One other feature of the Recruiting Rule bears emphasis. In general, contact with prospective students may not be initiated "by any person connected, or not connected, with the school." App. at 6-B. A broad exception applies to "feeder pattern" schools with whom far-reaching initial and targeted contact is permitted without restraint. App. at 7-8-B. Thus, particular speakers and relationships are favored under the Recruiting Rule by the "feeder pattern" exception. The "feeder pattern" exception does not typically apply to private schools, such as Petitioner.[2] TSSAA has "not explained the purpose for the feeder school exception" – why purported interests it has in enforcing the prohibitions of the Recruiting Rule do not apply to recruiting by representatives of "feeder pattern" schools.[3] App. at 47-B.

Concern about this type of exemption "is firmly grounded in basic First Amendment principles." Such an exemption, in this situation favoring public schools and certain types of private schools, may "give one side of a debatable public question an advantage in expressing its views to the people" (viewpoint discrimination) or it may allow government to select the "permissible subjects for debate" (content-based discrimination). *See Ladue v. Gilleo*, 512 U.S. 43, 51 (1994)(internal quotes omitted).

The Recruiting Rule Violation. The district court held the Recruiting Rule unconstitutional on its face and as applied. The "as applied" violation stemmed from a letter sent in April 1997 by Petitioner's head football coach to all

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[2] A "feeder pattern" exists where a middle school sends a large number of students to a particular high school each year. The term "feeder pattern" is not defined in the TSSAA rules. App. at 40-B.

[3] The district court made the following observation about the "feeder pattern" exception: "If conveying information to student-athletes about opportunities to attend out-of-zone schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of 'feeder schools.' The TSSAA cannot have it both ways." App. at 47-48-B.

new incoming male students. App. at 13-B. The letter was purely informational; it set forth the dates in May for spring football practice and invited the students to attend if interested. The letter was sent only to new students who had already applied, been accepted for admission and signed a contract to attend Petitioner the next fall. App. at 13-B. The letter was followed by a telephone call to each of the students to reaffirm that participation in spring practice was entirely optional. App. at 14-B. The students receiving the letters were entering high school and, therefore, had to change schools as they were graduating from middle school.

TSSAA rules allow the students who received the letters and calls to participate in spring practice. App. at 13-B. Sending the letters and making the telephone calls constituted the rule violation. It was legal for the incoming students to participate, but illegal for the school to communicate about the practice with those students. The specific language of the communications was not relevant to the violation. The fact of the communication itself constituted the rule violation. App. at 12-13-B.

Despite finding that there was "no indication of a deliberate intent to violate TSSAA rules by Brentwood Academy officials," TSSAA severely punished the school's entire athletic program. App. at 17-18-B & n.1.

In reversing the district court, the Sixth Circuit held that TSSAA's regulatory conduct was not state action and stated that federal courts "are not super-referees over high school athletic programs;" complaints "are to be resolved among the membership of the TSSAA, not in the federal courts." 180 F.3d 758, 766. This Court reversed last Term. 531 U.S. 288 (2001).

In its initial decision, the court of appeals recognized that "Brentwood has made strong arguments that the rule is vague and not well-tailored to the perceived evil sought to be avoided, which in turn may lead to arbitrary enforcement." 180 F.3d at 766. Upon remand from this Court's reversal of

its state action holding, the same panel found (on the same record) that Petitioner's same First Amendment facial challenges "strain[] credulity." 262 F.3d at 557.

This Petition ensues. Petitioner requests this Court once again to review an important and profoundly erroneous decision of the court of appeals, a decision that cuts a broad swath through fundamental First Amendment doctrine. As stated by national education experts Chester E. Finn, Jr. and Daniel Casse, App. 1-E, the court of appeals has "misperceived the importance of the issues raised and tended to view the case – somewhat dismissively – as merely a high school sports case." But the importance of the issues far transcends athletic eligibility, reaching "to the heart of ... access to quality education and school choice." And "the particular method of resisting access to educational... choice – the suppression of speech – is peculiarly odious ... because it suggests that government somehow has a right to expect students to attend (and play sports for) public schools." But "children are not the property of the state," App. at 8-9-E, and cannot be forced to attend "feeder pattern" schools.

The hostility of the speech-suppressive aspects of the Recruiting Rule to students' choice of secondary school "is palpable in the regulation under challenge," but government should not be able to "stifle access to educational opportunity through censorship." App. at 8-9-E. The threats to core First Amendment doctrine are manifold and far transcend the arena of high school athletics.

REASONS FOR GRANTING THE PETITION

I. THE ISSUES ARE OF NATIONAL IMPORTANCE BECAUSE OF THEIR POTENTIAL IMPACT ON SCHOOL CHOICE.

1. TSSAA's Recruiting Rule substantially restricts the ability of independent and parochial schools to

seek out students by informing them of educational opportunities. It also makes it more difficult for students and parents to learn about alternative educational options, including financial aid. The *per se* proscriptions on school-initiated targeted communication are "directed to communicative activity as such." *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775 (2002) (slip op. at 6). "[T]here is no core of easily identifiable and constitutionally proscribable conduct" that the speech-related *per se* rules address. *See Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 965-66 (1984).

The rule shuts down an important mode of communication on the part of schools. "That the proscription applies only to one mode of communication ... does not transform this into a 'time, place, or manner' case." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). This critical principle was ignored by the court of appeals, which believed that the existence of "multiple ways of communicating" with prospective students did transform this case into a "manner" case subject to intermediate rather than strict scrutiny. 262 F.3d at 552.

By requiring students to take the initiative in contacting schools before schools are permitted to communicate with students, the rule compromises prospective students who are "not deliberately seeking ... information." *Linmark*, 431 U.S. at 93. By prohibiting targeted school-initiated communication and channeling communications to general advertising or "supply[ing] information that real estate agents may give to new families moving to the community," 262 F.3d at 552, the rule mandates options for communication that are less effective and "involve more cost." *Linmark*, 431 U.S. at 93.

The impact of TSSAA's Recruiting Rule far transcends the athletic context since the rule applies to athletes and non-athletes alike and restricts both school representatives and unaffiliated persons. Unless an

independent school is willing to avoid interscholastic athletics or to ban students it recruits generally from interscholastic athletics, the school (and the potential students) are compromised.

By implementing the various speech-related bans on student recruitment – and focusing on students with and without an athletic record – TSSAA is limiting opportunity, not guarding against "undue influence."

The influence TSSAA is concerned with is that students and their families may learn of appealing educational opportunities, and about financial aid availability that can open wide a door of opportunity that might otherwise be slammed shut. TSSAA has described its concern about "undue influence" as relating to the "influence that letters and personal telephone calls from ... one of America's best high school football coaches, could have on an eighth grade student-athlete." Sixth Cir. App. at 605 The letter itself – the "communicative activity as such," *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775, (slip op. at 6), the identity of the communicator,[4] *First National Bank v. Bellotti*, 435 U.S. 765, 785 (1978), and the chosen "modalit[y]" for communication,[5] *Reno v. ACLU*, 521 U.S. 844, 879 (1997), not any overreaching element of the letter – is the basis of the violation. *See In re Primus*, 436 U.S. 412, 437 (1978).

Such is the "undue influence" that concerns TSSAA; it has only been explained in terms that demonstrate the fear that youngsters might actually be exposed to and then act on

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[4] See *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 812 (2000)("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles").

[5] *Cf. Schneider v. State*, 308 U.S. 147, 163 (1939)(leafletting ban held invalid as "one is not to have the exercise of ... expression in appropriate places abridged on the plea that it may be exercised in some other place").

ideas and opportunities of which they may not be aware. But such a rationale or justification, which focuses on a "concern for the effect of the subject matter on young [listeners]," *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811 (2000), is not "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)(internal quote omitted). The Recruiting Rule's understanding of "undue influence" and its rationale for the flat ban on school-initiated targeted expression "focus[] only on the content of the speech and the direct impact that speech has on its listeners." *Boos v. Barry*, 485 U.S. 312, 321 (1988). That is the "essence of content-based regulation." *Playboy*, 529 U.S. at 812. *See also Forsyth County*, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation").

Nothing in this case relates to threats, intimidation, coercion, or other such overreaching tactics that can be and should be prohibited. But, as the district court found, such critical interests are not what the Recruiting Rule aims to achieve. Rather, the rule seems driven by the fear that students who learn of attractive educational options will actually embrace those options. Information that can lead listeners – students and their families – to action poses the danger of "undue influence" in the eyes of TSSAA.

The exemptions to these bans for schools (largely public schools and certain private schools) that have "feeder patterns" are otherwise inexplicable. *See Ladue v. Gilleo*, 512 U.S. 43, 51 (1994)(explaining how concerns about "an exemption from an otherwise permissible regulation of speech" are "firmly grounded in basic First Amendment principles"). In "feeder pattern" situations, the speech-restrictive *per se* prohibitions of the Recruiting Rule have no application whatsoever; even threatening, harassing or other overreaching behavior is not subject to the *per se* ban on school-initiated individualized contact.

These realities led the district court to conclude that the Recruiting Rule's "ban has the effect of preventing ***any*** influence on a student, not just 'undue' influence." The district court cogently asserted that "TSSAA needs to go back to the drawing board and start over." App at 48-B. The court of appeals misapprehended just what is at stake, missing the mark by a wide margin on these critical issues.

2. A concern with public education has been the occasional mind-set that the public schools have a proprietary interest in the students of a community. But government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships, even at the expense of the child's overall welfare. Maintaining a competitive balance in athletics is not a legitimate basis for suppressing speech and thereby restricting educational opportunity for students. The district court saw this point but the court of appeals did not.

Properly understood, the role of public schools is to provide a service to students, affording them an opportunity for advancement. A risk is that the community and its public educators can get the sequence backwards, seeing students as objects for use by the state to achieve communal goals. Rather than focusing on the students and promoting their best interest, government and those acting on its behalf have sometimes taken steps deemed in the communal interest that are, unfortunately, at the expense of the educational opportunity of individual students. That treats students as creatures of the state – a means to a communal end.

Cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), however, teach that the liberty of the student and the student's family is the appropriate unit of concern and is afforded constitutional primacy. Government cannot constrain what a student learns. Parents, not the state, ultimately control the nature and scope of educational

opportunity for children, at least outside the public school curriculum. There are limits to how far states can go "to foster a homogeneous people." 262 U.S. at 402. When Oregon required all students to attend public schools, this Court pointedly observed that "[t]he child is not the mere creature of the State" and that the state had no "general power ... to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535.

In the current context, TSSAA has apparently determined that independent schools pose a threat to public education. Rather than viewing independent schools as a means of enhancing educational options available to the students of the state – placing more choices on the educational menu for students and their families – TSSAA has sought to circumscribe and even foreclose opportunities for many youngsters who may not be aware of independent school alternatives or who may mistakenly believe that independent school enrollment is financially unattainable.

In this scenario, independent schools are misperceived as a threat to the community rather than an alternative opportunity for the community's students. Independent schools, it is feared, may lure students ("our students") away from public schools with an adverse impact on certain aspects of the public system (*e.g.*, the ability of public schools to field championship sports teams).

Instead of acting in the students' best interests by encouraging communication about educational opportunities, TSSAA views students as a means to an end – a sports championship for a public school. This treats students as objects, as "mere creature[s] of the state," which *Pierce* forbids. That approach turns the role of government – facilitating educational opportunities for youth – on its head, and disrespects the primacy of student/family choice.

Even though students have a constitutionally-protected interest in attending independent schools (*Pierce*), in participating in athletics as a subject of education in an

independent school (*Meyer*), and in receiving information about independent school opportunities (*Stanley v. Georgia*, 394 U.S. 557, 564 (1969)), TSSAA flatly bars any independent school from "contact[ing] students enrolled at the public schools." App. at 8-B. TSSAA assumes that it is appropriate and desirable to establish and maintain a sort of Berlin Wall around public school students, ostensibly protecting them against the undefined use of "undue influence," but in reality inhibiting parents and students from learning about educational options they have a right to discover and embrace. *Cf. R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992)(government may not regulate based on hostility or favoritism towards underlying message expressed).

This forms the essence of the district court's holding that TSSAA "does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school." App. at 45-46-B. Indeed, the "State's interest . . . is the reverse. The State has a profound interest in students making informed choices about education." *Id.* at n.18. As the district court so cogently put it, "it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side . . . by suppressing the speech of the other. . . . TSSAA cannot control school choice through censorship." *Id.* at 46-B.

This Court should again review this case because of the importance of the issues to school choice and because of its potential implications for First Amendment doctrine.

II. THE ANALYSIS AND DECISION OF THE COURT OF APPEALS RAISES AND CUTS A BROAD SWATH THROUGH FUNDAMENTAL FIRST AMENDMENT DOCTRINE AND IS IN SUBSTANTIAL TENSION WITH DECISIONS OF THIS COURT.

The decision of the court of appeals raises – and its analysis cuts deeply into the marrow of – foundational First Amendment doctrine. For a summary, see Appendix G.

A. Content-Neutrality and Secondary Effects

At the most basic level, the court of appeals misconceived the inquiry surrounding the threshold determination of whether the Recruiting Rule is a content-based (or even a viewpoint-based[6]) regulation. That inquiry is a threshold one of singular importance in that it determines the level of scrutiny to be applied. *Ladue v. Gilleo*, 512 U.S. 43, 59 (1994)(O'Connor, J. concurring). Content-based regulations are "presumptively impermissible, and this presumption is a very strong one." *Id.*

The court of appeals concluded that the existence of alternative channels of expression for schools (as speakers) and students (as listeners) meant that the Recruiting Rule is not a content-based regulation. That is, the rule is not content-based ***because*** alternative channels exist for communication. This gets the analysis wrong and misperceives this Court's "secondary effects" cases.

This Court has "voiced particular concern with laws [such as TSSAA's ban on school-initiated targeted communication] that foreclose an entire medium of expression." *Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). This is true even if such a ban is "free of content or viewpoint discrimination." *Id.* The First Amendment danger posed by

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[6] *Cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993)(school district rule that barred use of school premises "for religious purposes" was viewpoint discrimination).

such prohibitions is that "by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* That is one clear concern with the Recruiting Rule's *per se* bans. Even without reference to the content basis of the regulation, the *per se* bans pose substantial First Amendment concerns. They are regulations of communicative activity as such and are subject to strict scrutiny for that reason alone.

The court of appeals here contends that, despite the restrictions on communicative activity contained in the *per se* prohibitions, the existence of alternative channels for communication transforms the analysis from a standard First Amendment strict scrutiny approach into a "manner" framework under intermediate scrutiny. That contention was made but not addressed in *Ladue* – that the regulation under review was a "mere regulation of the 'time, place, or manner' of speech because [potential speakers] remain free to convey their desired messages by other means." *Id.* at 56.

In *Reno v. ACLU*, 521 U.S. 844 (1977), the government asserted this theory. In response, this Court stated that a time, place or manner analysis is "inapplicable" when a regulation is content-based. *Id.* at 879-80. That is, contrary to the position of the court of appeals in this case, a regulation of expression – of communicative activity itself – does not become a "manner" regulation "because" it permits ample alternative channels of communication. The inquiry regarding the content-basis of a regulation of expression must be made on other, independent grounds. As this Court pointed out, the government's position in *Reno* was "equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." *Id.* at 880. *See also Discovery Network*, 507 U.S. at 430 (a content-based regulation of expression cannot be justified as a time, place, or manner restriction "regardless of whether or not it leaves open ample alternative channels of communication"); *Linmark*, 431 U.S. at 94 (ban on "only one mode of communication ... does not transform [a ban on

residential for-sale signs] into a 'time, place, or manner' case").

Under the court of appeals' analysis of the content-basis of the Recruiting Rule, a regulation will be considered a "manner" regulation (and not a content-based regulation) if it only bars entirely one modality of speech while leaving open alternative channels of communication. For this theory, the court of appeals relied on a faulty analogy to this Court's "secondary effects" cases. 262 F.3d at 553-54.

The court of appeals fundamentally misread the "secondary effects" cases, interpreting the principle of those cases as follows: "As long as the zoning ordinance did not ban the existence of [the theatres in question] outright, the Supreme Court found it to be content neutral." *Id.* at 553. Since the Recruiting Rule "does not completely ban all communications between coaches and prospective students," the court of appeals concluded, the rule was a "content-neutral regulation analogous to" the "secondary effects" cases. This was true even though the Recruiting Rule concededly "prohibit[s] the coaches and those acting on their behalf from initiating the contact." *Id.*

But this analysis misses the core ingredient of the "secondary effects" cases – that the basis of the regulation is not the speech itself but the effects on a neighborhood from adult entertainment venues. Neither the court of appeals nor TSSAA has articulated just what those secondary effects are (or could be) given that all communication, not just overreaching contact, is prohibited. The district court concluded that, under the circumstances, it was and could only be a concern with the "primary effect" that underlay the ban on school-initiated targeted communication – namely, that students who are exposed to information about attractive educational options might select a school other than one in his or her "feeder pattern." *Cf. Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (regulation of the "primary effects of ... expression"

focuses on the "effect on the audience" of the message itself). Such regulation is content-based and presumptively unconstitutional because "the government's interest is related to the content of the expression." *Id.* at 289.

The existence of alternative modes or channels of communication does not influence the threshold determination whether the regulation is content-based. It is relevant in ascertaining whether a regulation justified by its focus on "secondary effects" is, under the less strict standard of review applicable to those cases, compatible with the First Amendment. The court of appeals took great liberties with the "secondary effects" doctrine. If allowed to stand, the court of appeals' analysis of the "secondary effects" issue will spawn rotten analytical fruit well beyond the context of high school athletics regulation.

B. The Anti-Solicitation Issue

The Recruiting Rule restricts all school-initiated, targeted communication with non-matriculated students. Akin to "pure speech," this anti-solicitation provision is subject to strict scrutiny.

The court of appeals viewed the anti-solicitation provision as a "manner" restriction, subject to intermediate scrutiny. This position is in considerable tension with this Court's charitable solicitation cases, which demonstrate that the court of appeals' view of the ban on solicitation "represents a far too limited view" of the cases "relevant to ... soliciting by ... charitable organizations." *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628 (1980).

Under the charitable solicitation cases, "solicitation and speech" are "deemed so intertwined," *id.* at 631, that restrictions on solicitation are "entitled to the protections of the First Amendment." *Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959 (1984). "[S]tandard First Amendment analysis" applies, *Riley*, 487 U.S. at 788, since charitable solicitation "is protected speech." *Id.* at 789.

The First Amendment protects "more than abstract discussion, unrelated to action." It guarantees an "opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). Requiring a speaker to wait to speak until he or she is addressed first, as the Recruiting Rule does, is incompatible with that fundamental principle. Strict scrutiny applies to the regulation of speaker-initiated non-commercial speech. *See In re Primus*, 436 U.S. 412, 432 (1978)(regulation of solicitation "must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights'"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (same). "Broad prophylactic rules," such as the Recruiting Rule, "are suspect.... Precision of regulation must be the touchstone." *Id.*

TSSAA's ban on school-initiated, targeted communication is regulation of speech itself. The "manner" of solicitation is subject to content-neutral regulation, but the solicitation itself, as protected speech, may not be banned as a "manner" regulation. As speech or advocacy, solicitation is fully protected by the First Amendment; when "to this [First-Amendment-protected] persuasion other things are added which bring about coercion," then government may regulate such "other things." *Thomas v. Collins*, 323 U.S. at 537. TSSAA prohibits school-initiated, targeted communication itself, not focusing on "other things" that it might be able to regulate or prohibit. *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 768-69 (1988)(rejecting "manner" characterization as "linguistic prestidigitation" when "activity" being regulated is "constitutionally protected").

C. Content-Neutral vs. Content-Based Regulation: The Issues

The court of appeals reversed the holding that the Recruiting Rule was content-based regulation subject to

strict scrutiny. The court of appeals could "not see how the recruiting rule ... bans the substantive content of any particular message." 262 F.3d at 552. The court conflates the concepts of content-based and viewpoint-based regulation.

"The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic [or subject matter]." *Consol. Ed. Co. v. Pub. Serv. Comm'n,* 447 U.S. 530, 537 (1980). Such regulation is subject to strict scrutiny. *Id.* at 536. "It is ... no answer ... that [the Recruiting Rule] does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message." *Carey v. Brown*, 447 U.S. 455, 462, n.6 (1980). Whether animus exists toward specific ideas is not critical; discriminatory treatment is not suspect "only when [government] intends to suppress certain ideas.'" *Discovery Network*, 507 U.S. at 429.

In general, the Recruiting Rule bars the use of "undue influence," including First-Amendment-protected speech, "to retain a student for athletic purposes." More specifically, "[d]iscussion [by the coaching staff] of financial aid based on need with any prospective student/athlete" is prohibited prior to a student's actual enrollment in school ("attended 3 days of school"). App. at 7-B. Other topics of communication are permissible, but speech related to "athletic purposes" or financial aid is barred.

This is classic content-based regulation since the definition of permitted expression rests on the subject matter (albeit not the viewpoint) of the expression. *See, e.g., Playboy*, 529 U.S. at 811("The speech in question is defined by its content... 'sexually explicit adult programming'"); *Discovery Network*, 507 U.S. at 429 ("[T]he very basis for the regulation is the difference in content between ordinary newspapers and commercial speech"); *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116

(1991)(Son of Sam law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content"); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (When "one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message ... in the one is newsworthy or educational while the message imparted by the other is not," that "cannot help but be based on ... content").

The court of appeals seeks to avoid this analysis by noting that the Recruiting Rule does not absolutely "prevent" school representatives "from discussing the entire topic of its athletic programs." 262 F.3d at 552-53. School representatives are only prohibited from "initiating contact with students or their parents prior to enrollment in the school." There are "other outlet[s] for providing such information to prospective students." *Id.* at 552. The rule, like the zoning ordinance in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), does not "completely ban all communications between coaches and prospective students, but does keep them 'at a distance' by prohibiting the coaches ... from initiating the contact." 262 F.3d at 553. The court of appeals' analysis does not comport with this Court's controlling doctrine.

1. This Court has rejected the court of appeals' distinction between a burden on speech and a total ban on speech. In *Playboy*, the government argued that the challenged statute burdened but did not ban speech. This Court stated that "[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree.... [C]ontent-based burdens must satisfy the same rigorous scrutiny as ... content-based bans." 529 U. S. at 812.

2. The existence of alternative channels for communication is irrelevant in the face of censorship of

certain speech "modalities." In *Reno*, 521 U.S. at 879, the government argued that censorship "on many of the Internet's modalities ... is nonetheless constitutional because it provides a 'reasonable opportunity' for speakers to engage in restricted speech on the World Wide Web." As explained earlier, this Court rejected that defense as "equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." *Id.* at 880. Yet, that is the panel's position. *See Discovery Network*, 507 U.S. at 430 (content-based regulation subject to strict scrutiny "regardless of whether or not it leaves open ample alternative channels of communication").

3. The existence of alternative modalities of communication is immaterial because the "government ... may not substitute its judgment as to how best to speak for that of speakers and listeners." *Riley*, 487 U.S. at 791. "The First Amendment protects [the] right not only to advocate [a] cause but also to select what [the advocate] believes to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). That government "leaves open 'more burdensome' avenues of communication, does not relieve its burden on ... expression." If, as here, regulation is content-based, the degree of scrutiny is not relaxed because "other avenues of expression remain open." *Id.*; *cf. Linmark*, 431 U.S. at 93 (ban on residential "for sale" signs invalid; "newspaper advertising and listing with real estate agents" [the options enumerated by the court of appeals, 262 F.3d at 552] "involve more cost" and are "less likely to reach persons not deliberately seeking ... information").

4. The court of appeals' reliance on *Renton* is misplaced for two reasons.

(a) It conflicts with the solicitation/leafleting cases, which protect the right of speakers to initiate communication. The Recruiting Rule impermissibly prohibits school-initiated contact "even though the recipient of the literature ... is in fact glad to receive it" (the situation

herein). *Martin v. Struthers*, 319 U.S. 141, 144 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that ... it must be fully preserved"). The "manner" of speaker-initiated expression is subject to regulation, but a ban on such speech (as in the Recruiting Rule) under the guise of a "manner" regulation violates the First Amendment as a "naked restriction on the dissemination of ideas." *Id.* at 146-47. Under the First Amendment, government just cannot order a would-be speaker to refrain from speaking until someone else initiates the conversation or even to require a speaker to secure government permission before seeking to persuade a listener. *Thomas v. Collins*, 323 U.S. at 540. Yet this is what the Recruiting Rule does and what the court of appeals upholds.

(b) As explained earlier, *Renton* relied on a secondary effects theory. While the regulation applied only to a particular category of speech, its justification had nothing to do with that speech. The content of the speech was irrelevant and was not the regulation's target.

TSSAA's ban on school-initiated, targeted communication with prospective students cannot be justified based on *Renton* because TSSAA is concerned about the effects (the "undue influence") of the speech on the prospective students who are targets of the communication. These are "primary" effects, a fear that such communication "will cause those receiving the information to act upon it" in a way TSSAA deems inappropriate. *Linmark* 431 U.S. at 94 (ban on residential "For Sale" signs to promote racially stable neighborhood violates First Amendment). As the district court held, regulation on the basis of such "primary" effects is content-based, subject to strict scrutiny. *See Forsyth County*, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation"); *Playboy*, 529 U.S. at 811 (When the "overriding justification for the regulation is concern for the effect of the subject

matter on young viewers," it is content-based regulation subject to strict scrutiny); *Reno*, 521 U.S. at 867-68 (law "to protect children [on the Internet] from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech," is a content-based regulation).

Boos v. Barry, 485 U.S. 312 (1988), a case not considered by the court of appeals, demonstrates the erroneousness of the court of appeals' approach to the secondary effects issue. This Court noted that "[r]egulations that focus on the direct impact of speech on its audience [such as the Recruiting Rule] present a different situation" than that in *Renton*. *Id.* at 321.

"Listeners' reactions to speech are not the type of 'secondary effects' ... referred to in *Renton*." *Id.* Thus, if the Renton zoning ordinance "was justified by the city's desire to prevent the psychological damage ... associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate" because that type of regulation "targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." *Id.*

TSSAA's concern about "undue influence" focuses on the "direct impact of a particular category of speech" on the listener, not on some "secondary effect" of that type of speech unrelated to the content of the speech itself. *Cf. In re Primus*, 436 U.S. at 431-33 (holding ban on non-commercial solicitation, to prevent "undue influence," subject to strict scrutiny). The Recruiting Rule is content-based regulation of expression subject to strict scrutiny and cannot be justified under *Renton*'s "secondary effects" rationale. The "manner" in which solicitation is carried out can be regulated, but solicitation, as a form of speech, cannot be banned.

5. The "manner" of solicitation can be regulated to combat "undue influence" in the sense of "overreaching, misrepresentation, invasion of privacy," *id.* at 435, or threats,

coercion, or harassment. 13 F. Supp.2d at 689. What the First Amendment prohibits is "control[ling] school choice through censorship." *Id.* To the extent that TSSAA's interest is in guarding not against "undue influence" but "unduly effective influence," that goal butts into the First Amendment. School-initiated, targeted communication to non-matriculated students "may influence the outcome" of a student's decision whether or not to attend a particular school. "[T]his would be its purpose." But "the fact that advocacy may persuade ... is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978). TSSAA may not "restrict the speech of some [members] in order to enhance the relative voice of others." That is "wholly foreign to the First Amendment." *Id.* at 790-91. To the extent that the "feeder pattern" exception favors one set of speakers/listeners or enhances the "relative voice" of those speakers, that provision is in tension with the First Amendment principles embraced in *Bellotti*.

D. Content-Neutrality: The Identity of the Speaker

The Recruiting Rule bans contact by a coach with a student or a student's parents prior to that student's "enrollment" in the school. The ban applies "to all students whether or not they have an athletic record." The rule controls who can speak for a school, a form of content-based regulation.[7] *Id.* at 785 (control over the identity of the "speakers who may address a public issue" is content regulation subject to strict scrutiny). The "feeder pattern" exception, which allows coaches and other school representatives to communicate with impunity with students

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[7] The Recruiting Rule "limits access by certain speakers to certain potential listeners," and "by restricting the speech of coaches, it limits the most informed speakers on the subject of athletics." App. at 49-B.

within the feeder pattern, clearly favors one set of speakers over others. Such regulation is subject to strict scrutiny. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (government regulation may not favor one speaker over another); *Carey v. Brown*, 447 U.S. at 466 (law favoring labor picketers over other types of protesters subject to strict scrutiny).

E. The Facial Challenge Issue

A facial First Amendment challenge lies in two circumstances: (i) where a regulation, in validly regulating non-expression, infringes on "a substantial amount of speech that is constitutionally protected;" (ii) where a regulation "delegates overly broad discretion to the decisionmaker." *Forsyth County*, 505 U.S. at 130. A government regulation "that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Id.* "[P]lacing unbridled discretion in the hands of ... government ... constitutes a prior restraint and may result in censorship" or self-censorship. And "[s]elf-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *Lakewood*, 486 U.S. at 757.

Proof of an "abuse of power in the particular case" is not required to make out a facial challenge. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Thus, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County*, 505 U.S. at 133 n.10.

1. The court of appeals held that Petitioner "must establish that no set of circumstances exist under

which the Act would be valid." 262 F.3d at 555. In general, that is the standard under *United States v. Salerno*, 481 U.S. 739, 745 (1987). But "[t]hat is not the case ... when the statute regulates speech." *Watchtower Bible & Tract Soc'y v. Stratton*, 240 F.3d 553, 562 (6th Cir. 2001). Because of the concern about chilling expression, a facial First Amendment challenge lies if a significant number of situations exist where, as here, a regulation could be applied so as to prohibit constitutionally protected speech. *Forsyth County*, 505 U.S. at 130; *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

2. The court of appeals' opinion takes the opposite stance, that it should not "strike down a statute on its face where there [are] a substantial number of situations to which it might be validly applied." 262 F.3d at 556 (quoting *Parker v. Levy*, 417 U.S. 733, 760 (1974)). But *Parker* explicitly recognized that, under *Broadrick*, First Amendment doctrine was quite different outside the military context. The "different character of the military community and of the military mission requires a different application" of First Amendment protections. *Id.* at 758. Thus, ***in the very next paragraph*** after that quoted by the court of appeals, this Court distinguished *Broadrick* "for the reasons dictating a different application of First Amendment principles in the military context." *Id.* at 760.

General First Amendment facial challenge doctrine as reflected in *Forsyth County* and *Broadrick* control in this non-military context. Contrary to the assertion of the court of appeals, *Parker*'s "principles are [not] fully applicable to the case before us." 262 F.3d at 557.

3. In rejecting Petitioner's facial challenge, the court of appeals "focus[ed] on how the rule was applied to Brentwood." *Id.* at 556. It stated that there was not "any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Id.* (quoting *Vincent*, 466 U.S. at 798). But that is not the law with regard

to facial First Amendment challenges. Thus, ***in the very next paragraph*** in *Vincent* after the one quoted by the court of appeals, this Court stated that it ***has*** "recognize[d] an exception to this general rule for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties." 466 U.S. at 798.

With regard to First Amendment interests, "the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Id.* So, a facial challenge will lie when there is a real and substantial risk to First Amendment values from enforcement of a statute, even if the statute can be applied validly in some situations and even if the First Amendment jeopardy attaches only to "parties not before the Court." *Id.* at 801. The court of appeals' rejection of a facial challenge was erroneous and is worthy of review in this Court.

The court of appeals would broadly foreclose facial First Amendment challenges; this Court's cases go in the opposite direction, facilitating such challenges because of the threat of censorship and self-censorship.

"The First Amendment prohibits the vesting of ... unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133. A party challenging a law based on such unbridled discretion "may challenge it facially without the necessity of first" subjecting itself to the exercise of that discretion. *Lakewood*, 486 U.S. at 755-56. Petitioner, therefore, can bring a facial challenge to the Recruiting Rule quite apart from "how the rule was applied to Brentwood." In the special circumstance of a facial First Amendment challenge, "the Court has altered traditional rules of standing to permit ... [l]itigants ... to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from ... protected speech or expression." *Broadrick*, 413

U.S. at 612. Thus, the court of appeals erred by "focusing on how the rule was applied to Brentwood." 262 F.3d at 556.

4. "The First Amendment prohibits the vesting of ... unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133. The court of appeals concluded that, "[a]lthough the recruiting rule by itself is certainly subject to challenge," the "interpretive commentary" saves it from facial challenge on grounds of excessive discretion. 262 F.3d at 557. The court of appeals has seriously misinterpreted the rule and the doctrine.

The interpretive commentary sets forth a set of *per se* rules of illegality. These guides expressly are (Question 4) not limits on or substitutes for the underlying "undue influence" standard but specific examples of what constitutes a violation of that standard. App. at 7-B. TSSAA remains free to apply the underlying "recruiting rule by itself," with all the unbridled discretion the district court found so troubling, and the Executive Director retains his unfettered discretion to exercise his plenary waiver authority.

Vague rules, and the discretion they give to government officials, are objectionable (on due process grounds) because of the lack of notice they provide. But, even more importantly in the First Amendment context, they are problematic because they (a) encourage self-censorship and (b) make it difficult on an "as applied" basis to distinguish between legitimate regulatory conduct and the "illegitimate abuse of censorial power." *Lakewood*, 486 U.S. at 757-59. While the "interpretive commentary" may provide notice about specific prohibitions of the rule, it does nothing to restrain the "unbridled discretion" of TSSAA in its implementation of the underlying "undue influence" standard of the Recruiting Rule itself. The issue of discretion and Petitioner's ability to challenge that "unbridled discretion" as a facial First Amendment violation is well worth this Court's attention.

F. The "Pure Speech" Issue

The basis for TSSAA's disciplinary action was the fact of communication about lawful activity (spring football practice). The communications were not overreaching, coercive or threatening; they were merely informative. Thus, the Recruiting Rule bars and punishes "the fact of communication," not just some "separately identifiable conduct." *See Cohen v. California*, 403 U.S. 15, 18 (1971). Sending a benign, informative letter (with similarly benign follow-up phone calls), by themselves, violated the rule.

In comparable circumstances, the Attorney General has declined to enforce federal law that prohibits disclosure of information about lawful conduct on the ground that such enforcement would violate the First Amendment. *See Magee v. United States*, 93 F. Supp.2d 161 (D.R.I. 2000); *N.Y. State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998). This is the regulation of "pure speech" and, under *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1761 (2001), is subject to strict scrutiny even if the regulation itself is content-neutral. This case provides a good vehicle for developing the "pure speech" doctrine announced last Term in *Bartnicki*.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff/Appellee,	)	
v.	)	**No. 98-6113**
	)	
TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,	)	
	)	
Defendants/Appellants.	)	

On Remand from the United States Supreme Court.
No. 97-01249 – Todd J. Campbell, District Judge.
Argued: July 19, 2001
Decided and Filed: August 23, 2001
Before: GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Richard L. Colbert, COLBERT & WINSTEAD, Nashville, Tennessee, for Appellants. James F. Blumstein, VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, Tennessee, for Appellee. ON BRIEF: Richard L. Colbert, COLBERT & WINSTEAD, Nashville, Tennessee, for Appellants. James F. Blumstein, VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, Tennessee, Lee Barfield, II, BASS, BERRY & SIMS, Nashville, Tennessee, G. Thomas Nebel, Nashville, Tennessee, for Appellee.

RONALD LEE GILMAN, Circuit Judge. This case is before us on remand from the Supreme Court. Brentwood Academy, a private school and member of the Tennessee Secondary School Athletic Association (TSSAA), sued TSSAA pursuant to 42 U.S.C. § 1983 for the alleged violation of its First Amendment rights. Specifically, Brentwood challenges the constitutionality of TSSAA's "recruiting rule," which prohibits member schools from exerting "undue influence . . . to secure or retain a student for athletic purposes." The district court granted summary judgment in favor of Brentwood, holding that the recruiting rule violates the school's First Amendment rights.

TSSAA appealed, arguing that it is not a state actor for the purposes of § 1983 and, in any event, that the recruiting rule does not run afoul of the First Amendment. We reversed the decision of the district court on the basis that TSSAA is not a state actor, and therefore not subject to suit under § 1983. The Supreme Court granted certiorari and disagreed with our opinion, holding that TSSAA is in fact a state actor. It then remanded the case back to us for further proceedings consistent with the Court's opinion.

We now turn to the merits of TSSAA's appeal. After considering the parties' supplemental briefs and hearing oral arguments regarding the recruiting rule, we conclude that the district court erred in granting summary judgment in favor of Brentwood. For the reasons set forth below, we therefore REVERSE the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

Brentwood is a private school located in Brentwood, Tennessee that has historically placed a strong emphasis on athletics. In particular, the football team has been nationally ranked by USA Today and has won at least seven TSSAA state championships. Brentwood's basketball team is also well known in athletic circles.

TSSAA is an association comprised of public, independent, and parochial secondary schools from across the state of Tennessee, whose purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." To that end, TSSAA has enacted a "recruiting rule" designed to place limits on the recruiting practices of secondary schools in soliciting middle school student athletes to participate in secondary school athletics. The recruiting rule is found in Article II, Section 21 of the TSSAA Bylaws, and reads as follows:

> Section 21. The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

Section 21 is comprised of not only the recruiting rule itself, but also the equivalent of two full pages of questions, answers, and guidelines that provide explanations, details, and examples of the types of conduct the recruiting rule prohibits. This commentary sets forth principles that aid the member schools in complying with the recruiting rule.

For example, the first question provides the following information on what the term "undue influence" means:

> Q. How is undue influence interpreted in the recruiting rule?
>
> A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

The third question explicitly prohibits coaches from initiating contact with students prior to their enrollment in a secondary school:

> Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?
>
> A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

The fourth question asks: "What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?" It then provides seven examples. The third example reiterates that the recruiting rule prohibits "[a]ny initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern." The seventh example specifically prohibits "[a]dmitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite

feeder pattern involved with the school." The feeder-school exemption is not applicable to Brentwood, because it has no feeder pattern with any school.

Several representatives of Brentwood met with Ronnie Carter, the Executive Director of TSSAA, on February 10, 1993. This meeting was held at the request of Brentwood for the purpose of clarifying what types of recruiting practices would be acceptable under the recruiting rule. Michael S. Peek, a lawyer for Brentwood, followed up with a letter on February 24, 1993 that was intended to confirm Brentwood's understanding of the numerous ways in which Brentwood could communicate with prospective students about its athletic programs without violating the recruiting rule.

In 1997, several coaches at other member schools complained to TSSAA that Brentwood had violated various TSSAA rules. Carter conducted an investigation of the complaints. On July 27, 1997, Carter wrote a letter to Brentwood outlining six alleged violations of TSSAA rules. Five violations related to the recruiting rule and one to the sports-calendar rule. Only the recruiting rule violations are at issue in this appeal.

The alleged recruiting rule violations arose from two incidents. The first incident occurred when Brentwood's then Athletic Director and Head Football Coach, Carlton Flatt, provided free tickets to a middle school coach for a Brentwood football game. These tickets were then used by the middle school coach to take several of his students to attend the game. The second incident arose when Coach Flatt sent letters and made followup telephone calls in the spring of 1997 to students from other schools who had contractually agreed to attend Brentwood in the fall of 1998, but who had not themselves solicited any information

regarding Brentwood's athletic program. Carter, on behalf of TSSAA, imposed a number of penalties on Brentwood for these violations.

Brentwood appealed the sanctions according to the two-step process set forth in the TSSAA Bylaws. Carter presided at the first step and reduced the sanctions as a consequence of the appeal. Brentwood next appealed to the full Board of Control of TSSAA, which at the time consisted only of public high school principals. A hearing was held on August 23, 1997. The Board of Control found that Brentwood had violated the recruiting rule by admitting student athletes free of charge to an athletic contest and by contacting middle school students while they were enrolled in other schools. As punishment, the Board fined Brentwood $3,000, placed its athletic program on probation for four years, and suspended Brentwood from participating in tournaments and conducting certain types of off-season practice for two years.

B. Procedural history

Brentwood filed suit against TSSAA in the United States District Court for the Middle District of Tennessee on December 12, 1997. It alleged that TSSAA was a state actor and that TSSAA's enforcement of the recruiting rule violated its First and Fourteenth Amendment rights. Brentwood also sought an injunction against TSSAA's enforcement of the recruiting rule. Faced with cross-motions for summary judgment, the district court granted Brentwood's motion for summary judgment on its First Amendment claim and enjoined TSSAA from enforcing the recruiting rule.

TSSAA appealed the district court's grant of summary judgment in favor of Brentwood, arguing that (1) TSSAA is not a state actor, thereby rendering it immune

from constitutional scrutiny, and (2) the recruiting rule in any case does not violate Brentwood's First Amendment rights. Our prior opinion did not reach the merits of TSSAA's challenge to the district court's First Amendment ruling because we concluded that TSSAA was not a state actor. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999). Brentwood sought review of our decision by the Supreme Court., which granted certiorari. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 528 U.S. 1153 (2000). The Supreme Court reversed our decision, holding that TSSAA is a state actor, and remanded the case to us for further proceedings consistent with its opinion. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). Before us now are the merits of TSSAA's appeal regarding the constitutionality of the recruiting rule.

II. ANALYSIS

A. Standard of review

We review de novo the district court's grant of summary judgment. *See, e.g., Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The judge is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial exists only when there is sufficient "evidence

on which the jury could reasonably find for the plaintiff." *Id.* at 252.

B. Brentwood has not waived its right to challenge the constitutionality of the recruiting rule

TSSAA now recognizes, as it must under the Supreme Court's ruling, that it is a state actor subject to constitutional challenges. It nevertheless argues that Brentwood has waived its right to question the constitutionality of the recruiting rule because, by voluntarily choosing to be a member of TSSAA, it agreed to abide by the rules of the organization. TSSAA thus contends that Brentwood is faced with "the choice between joining TSSAA and complying with the rules or competing in interscholastic athletics as a non-member of TSSAA."

The five cases that TSSAA cites to support its argument, however, are distinguishable from the case at hand. *See Town of Newton v. Rumery*, 480 U.S. 386 (1987) (holding that a criminal defendant can waive important constitutional rights by entering into a plea bargain); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (holding that where there is no unequal bargaining power or overreaching, debtors can voluntarily, intelligently, and knowingly waive due process rights by signing a cognovit note, which is an agreement by which a debtor consents in advance to a holder's obtaining a judgment without notice or hearing); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985) (concluding that when a party knowingly, voluntarily, and intentionally signs a jury waiver provision in a civil case, that party has waived its right to a jury trial); *International Union v. Dana Corp.*, 697 F.2d 718, 719 (6th Cir. 1983) (holding that a settlement agreement between Dana and the union rendered an appeal moot, even though the agreement "effectively prevented Dana from

communicating with its employees regarding [a union campaign] at one of Dana's subsidiaries"); *Lake James Cmty. Volunteer Fire Dep't v. Burke County*, 149 F.3d 277 (4th Cir. 1998) (concluding that an agreement between a volunteer fire department and the county that prohibited the fire department from suing the county was enforceable, even though it waived the fire department's constitutional right to petition the government).

The common legal thread among the above five cases is that they all involve parties that actually waived their right to sue. There is no comparable TSSAA provision prohibiting members from challenging the constitutionality of the recruiting rule. Moreover, Brentwood points out that what was once called the "bitter-with-the-sweet" doctrine has been replaced with the "unconstitutional conditions" doctrine. In the words of the Supreme Court:

> Recognizing that constitutional violations may arise from the deterrent, or chilling, effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights . . . our modern unconstitutional conditions doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (internal quotation marks and citation omitted) (alterations in original).

Umbehr involved a § 1983 claim for unlawful retaliation brought against the county's governing body by an

independent contractor who provided trash collection services to the county. The Court held that the contractor had stated a cause of action based on the allegation that his contract was terminated in retaliation for his criticism of the county commission. Umbehr is an extension of the protections provided to public employees under the First Amendment. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding that the board of education violated a school teacher's First Amendment rights by dismissing him because he had criticized the board in a letter to the local newspaper). We believe that the Supreme Court's rulings that parties do not give up First Amendment rights by contracting with, or being employed by, a public agency forecloses TSSAA's argument that Brentwood gave up its right to challenge the constitutionality of the recruiting rule because it voluntarily joined TSSAA.

TSSAA argues, however, that the First Amendment protection afforded by *Umbehr* and *Pickering* applies only when the content of a contractor's or employee's speech involves a "matter of public concern." *Umbehr* .8 U.S. at 685; *see also Pickering*, 391 U.S. at 574. I' .aims that the recruiting rule does not implicate a matter o. public concern, and is therefore unworthy of First Amendment scrutiny. But TSSAA cannot have it both ways. As set forth in Part II.F. below, TSSAA will have to establish that the recruiting rule embodies substantial governmental interests as a necessary element of the rule's enforceability. These substantial interests will by definition implicate a "matter of public concern." *See Pickering*, 391 U.S. at 573 (holding that issues involving the local board of education were "matters of public importance").

We therefore conclude that Brentwood has not waived its right to challenge the constitutionality of the recruiting rule by voluntarily joining TSSAA. This means

that we must now reach the merits of the district court's First Amendment analysis of the recruiting rule.

C. The district court erred in holding that the recruiting rule is a content-based regulation for the purposes of First Amendment analysis

TSSAA's appeal broadly challenges the analytical framework that the district court used to determine the constitutionality of the recruiting rule. The primary contention of TSSAA is that the district court erred in concluding that the recruiting rule is a content-based regulation that fails strict scrutiny review. We agree.

A fundamental premise of First Amendment jurisprudence is that the "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). Such regulations are subject to "the most exacting scrutiny," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), which means that the state actor must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). On the other hand, content-neutral regulations that simply restrict the time, place, and manner of speech are subject to intermediate scrutiny. *See Watchtower Bible & Tract Soc'y of N. Y., Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 560 (6th Cir. 2001) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Under that analysis, content-neutral regulations must be "narrowly tailored to serve a significant governmental interest. . . that. . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Supreme Court has recognized that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broad.*, 512 U.S. at 642. In this instance, the district court concluded that the recruiting rule "is content-based because the interests asserted by [TSSAA] to support the ban focus on the content of the message and the effect of the message on the listener." We respectfully disagree.

In our opinion, the recruiting rule does not impose a total ban, or a "Berlin Wall" as Brentwood calls it, on communications between secondary schools and middle school athletes regarding high school athletics. Rather, the recruiting rule prohibits secondary schools from exerting an "undue influence" on students with the goal of "secur[ing] or retain[ing] a student for athletic purposes." We do not see how the recruiting rule, as defined by the questions, answers, and guidelines contained within the TSSAA Bylaws, bans the substantive content of any particular message. It is clear to us that the greatest restriction imposed by the recruiting rule is the prohibition on coaches, coaching staff, and school representatives from initiating contact with middle school students for the purpose of recruiting student athletes.

In our view, prohibiting coaches from initiating contact with students or their parents prior to enrollment in the school is a limitation on the manner in which secondary schools can communicate students about their athletic programs. It does not mean, however, that Brentwood has no other outlet for providing such information to prospective students, or that middle school students have no way of finding out this information or learning about their educational options.

Perhaps the strongest evidence in the record that supports our view that the recruiting rule does not constitute

a total ban on communications between secondary schools and prospective students regarding athletic programs is the letter that Brentwood attorney Michael Peek wrote to Ronnie Carter following their meeting in February of 1993. The letter details numerous ways in which Brentwood can get its message about athletics out to prospective students. Examples of conduct that Peek claims were explicitly approved by Carter on behalf of TSSAA include the following: admissions officers and representatives of Brentwood can supply information that real estate agents may give to new families moving to the community; Brentwood can respond to direct inquiries from students or their families that have contacted it for information; Brentwood can advertise in any publication it chooses; and can contact 7th and 8th graders in any school regardless of their extracurricular activities and interests if such contact is made in the context of a letter or other communication directed to members of the class as a whole. We believe that this range of options, which is not exclusive, acknowledges that Brentwood has multiple ways of communicating with middle school students to provide them with information about the academic, athletic, and spiritual aspects of the educational experience at Brentwood.

We fail to see how the recruiting rule "effectively drive[s] certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). But Brentwood maintains that the recruiting rule constitutes a content-based regulation of speech in at least three ways. First, it argues that the recruiting rule prohibits independent schools and their representatives from "discuss[ing] an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). Second, Brentwood claims that the rule prevents prospective students and their parents from learning about independent educational options. Finally, it maintains that

TSSAA enacted the recruiting rule to prevent prospective students from learning about athletic programs at independent secondary schools.

Brentwood's three contentions, however, are not persuasive. As described above, the prohibitions of the recruiting rule do not prevent representatives of Brentwood from discussing the entire topic of its athletic programs. Prospective students and their parents also have a wide range of available means to receive information about the athletic and educational opportunities that Brentwood provides. Nor is there evidentiary support for Brentwood's position that the recruiting rule is a content-based regulation designed by TSSAA out of fear of what prospective students would learn about the athletic programs at independent secondary schools. If TSSAA had been motivated by a fear of the impact that information regarding athletic programs would have on students, it would presumably have banned recruiting and communications altogether. This it did not do.

Finally, we reject Brentwood's contention that the recruiting rule is unconstitutional because it controls who can speak for Brentwood. The recruiting rule is not an unconstitutional regulation that "dictat[es] ... the speakers who may address a public issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (holding that a state statute prohibiting expenditures by banks and business corporations for the purpose of influencing the vote on any question other than one materially affecting the business interests of the corporation unconstitutionally infringed on their First Amendment rights). Although the rule emphasizes that coaches and members of the coach's staff must refrain from exerting "undue influence" by initiating contact with prospective students, the rule does not ban these persons from communicating with students who themselves initiate contact.

In sum, we conclude that the district court erred in holding that the recruiting rule is a content-based regulation subject to analysis under "the most exacting scrutiny." *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994). We therefore turn to an analysis of the rule as a content-neutral regulation.

D. The recruiting rule is a content-neutral regulation subject to intermediate scrutiny

We are of the opinion that the recruiting rule is a content-neutral regulation analogous to certain zoning ordinances that have been deemed to contain reasonable time, place, and manner restrictions. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986), for example, an ordinance provided specific zoning requirements for adult theaters. The Supreme Court found that "the Renton ordinance [was] aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community." *Id.* at 47 (emphasis in original). As long as the zoning ordinance did not ban the existence of these theaters outright, the Supreme Court found it to be content neutral. *See id.* at 46 ("The Renton ordinance . . . does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school."). Similarly, the recruiting rule does not completely ban all communications between coaches and prospective students, but does keep them "at a distance" by prohibiting the coaches and those acting on their behalf from initiating the contact.

Other examples of regulations that have been upheld against First Amendment challenges despite limiting the

time, place, and manner of the targeted activities include *Madsen v. Women's Health Ctr, Inc.*, 512 U.S. 753, 772 (1994) (upholding a state court injunction that restricted the use of sound amplification equipment and other noise created by anti-abortion protesters to certain hours and days); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 8 14-15 (1984) (upholding an ordinance that prohibited the posting of signs on public property based on the government's interest in promoting aesthetics); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding a state regulation requiring a religious organization that desired to distribute religious materials and solicit donations at a state fair to do so only at a rental booth in the designated area).

The Supreme Court has recognized that content-neutral regulations can have a dampening effect on the substance of the protected speech, but that such limitations are constitutionally permissible. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding the regulation of noise levels at musical performances in a public park to avoid undue intrusion on the tranquility of the surrounding public and residential areas). Assuming that TSSAA is able to successfully establish that it has substantial governmental interests in support of the recruiting rule (see Part II.F. below), we cannot say that the rule's incidental effect of preventing members of high school coaching staffs from initiating contact with middle school students is fatal to content neutrality. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

Based on our conclusion that the recruiting rule is content neutral, it is subject to an intermediate scrutiny standard of review. *See Watchtower Bible & Tract Soc'y of N. Y, Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 560 (6th Cir. 2001). "'[C]ontent-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton*, 475 U.S. at 47; *see also Ward*, 491 U.S. at 798 ("the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but. . . it need not be the least restrictive or least intrusive means of doing so").

E. The recruiting rule is not facially overbroad in violation of the First Amendment

The district court also held that even if the recruiting rule is not an unconstitutional content-based regulation, it runs afoul of the First Amendment because the language of the rule provides TSSAA with the "unbridled discretion to penalize those expressing points of view with which it disagrees." In so ruling, the district court relied on *Forsyth County, Ga. v. Nationalist Movement*, 515 U.S. 123, 129-33 (1992). *Forsyth County* involved a facial challenge under the "overbreadth doctrine" to a county ordinance that required parties to obtain a permit and pay a fee in order to gain authorization to speak publicly, hold a public parade, or assemble. A challenge under this doctrine can be mounted in "cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker." *Id.* at 129. The district court concluded that terms such as "undue influence" and "appropriate or normal" in the recruiting rule are so undefined and provide TSSAA with such arbitrary

discretion that the rule is an impermissibly overbroad regulation.

TSSAA first attempts to avoid a challenge under the overbreadth doctrine by arguing that the recruiting rule regulates commercial speech. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) ("the overbreadth doctrine does not apply to commercial speech"). It claims that because Brentwood is a private school, recruiting students is a commercial activity. We agree with the district court that the recruiting rule does not invoke the commercial speech analysis. The "test for identifying commercial speech" involves determining whether a regulation relates to a "commercial transaction." *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (determining that America Future Systems, Inc.'s "tupperware party"-like lectures on its housewares in college dormitories constituted commercial speech, and remanding the case for review under the intermediate scrutiny standard); *see also City of Cincinnati v. Discovery Network Inc.*, 507 U.S. 410, 422-23 (1993) (striking down a city's selective and categorical ban on the distribution, via newsrack, of "commercial handbills" as violative of the First Amendment).

We conclude that TSSAA's argument in this regard is unpersuasive. Brentwood is an educational institution. The fact that it is private does not render its academic, athletic, and spiritual goals commercial. Nor is TSSAA able to cite any authority in support of its "commercial transaction" argument as applied to the recruiting of student athletes by a private school. Because we conclude that the recruiting rule does not constitute a regulation of commercial speech, we must now turn to TSSAA's alternate contention that the rule is not unconstitutional under the overbreadth doctrine.

"A facial challenge to a legislative Act, is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Supreme Court has set forth the following principles for evaluating facial challenges under the overbreadth doctrine:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

"To succeed . . . the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates*, 455 U.S. at 497. Cases that have held legislation unconstitutional on its face under the overbreadth doctrine, moreover, have not created "any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984); *see also Bd. of Trustees of the State Univ. of N.Y. v.*

Fox, 492 U.S. 469, 484-85 (1989) ("It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily - that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiffs own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws.").

In our opinion, the district court erred in striking down the recruiting rule as facially overbroad without focusing on how the rule was applied to Brentwood. We turn now to this analysis. TSSAA found that Brentwood's two violations of the recruiting rule consisted of admitting middle school athletes free of charge to an athletic contest at Brentwood and of contacting middle school students to inform them of Brentwood's athletic practices before they were enrolled there. In particular, the second violation arose from Coach Flatt's letter to incoming students regarding spring football practice and followup telephone calls to the students. Pursuant to Article II, Section 1(b) of TSSAA's Bylaws, a student is not considered "enrolled" until he or she has attended the school for at least three days. None of the incoming students met this criterion.

Both of Brentwood's alleged violations are explicitly listed as prohibited conduct that constitutes "undue influence" in the commentary accompanying the recruiting rule. As previously noted, the seventh example in response to question four under the recruiting rule includes "[a]dmitting students to athletic contests free of charge where there is an admission being charged at the contest . . Furthermore, the third question following the recruiting rule prohibits a coach from contacting students not enrolled in their school:

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

These questions, answers, and guidelines are entitled to consideration in evaluating an overbreadth challenge. *See Forsyth County*, 506 U.S. at 131 ("In evaluating [the] facial challenge, we must consider the [association's] authoritative instructions of the [rule], including its own implementation and interpretation of it."); *see also Ward*, 491 U.S. at 794-96 (holding that the city's sound-amplification guideline and the city's interpretation of the guideline provided sufficient limiting instructions to render the ordinance's statements ensuring the "best sound" and "appropriate sound quality" immune from an overbreadth challenge). We also note that the Supreme Court has

> repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute. . . covers a whole range of easily identifiable and constitutionally proscribable. . . conduct.

Parker v. Levy, 417 U.S. 733, 760 (1974) (internal quotation marks omitted and ellipses in original).

The above principles are fully applicable to the case before us. Although the recruiting rule by itself is certainly subject to challenge based on vagueness and overbreadth, it is accompanied by the equivalent of two full pages of question-and-answer explanations and guideline interpretation. As a whole, the rule gives reasonable notice of what is prohibited, especially as applied to Brentwood. The interpretive commentary explicitly states that free tickets cannot be provided to prospective students, nor can a coach initiate contact with potential players before they enroll in the school. Brentwood allegedly did both of these things, and was punished accordingly. To claim now that the rule is overbroad as applied to Brentwood strains credulity. We therefore conclude that the district court erred in holding the recruiting rule unconstitutional on the basis of being facially overbroad.

F. Remand is required to determine if the recruiting rule is narrowly tailored to meet TSSAA's substantial interests

As set forth in Part II.D. above, we have determined that the recruiting rule is a content-neutral regulation subject to intermediate scrutiny for the purpose of First Amendment analysis. This means that TSSAA has the burden of establishing (1) the legitimacy of its alleged substantial governmental interests and (2) that the recruiting rule as applied to Brentwood in the case before us is narrowly tailored to further these governmental interests. The Supreme Court has described this analysis as follows:

> [A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so.

> Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. . . . The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

Ward, 491 U.S. at 798-800 (internal quotation marks, alterations, and ellipses omitted).

In TSSAA's response to Brentwood's motion for summary judgment, TSSAA asserted two interests in justification of the recruiting rule: (1) to keep high school athletics in their proper place subordinate to academics and (2) to protect student athletes from exploitation. TSSAA proffered an additional interest on appeal, namely that of fostering a level playing field between the various member schools. This latter interest seeks to establish a degree of competitive equity in high school athletics by regulating how the member schools recruit student athletes.

This court previously recognized the validity of TSSAA's first asserted interest when it concluded that "[TSSAA] is ordinarily entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life." *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 3 86-87 (6th Cir. 1992). The district court below also acknowledged this interest as a substantial one. TSSAA's other two justifications, however, are very much in dispute.

Brentwood, for example, argues that there is no support in the record for the proposition that student athletes need protection from exploitation. The district court agreed. It concluded that TSSAA offered no proof that exerting undue influence on middle school athletes to recruit them for athletic purposes actually harms those students. Proof of actual harm, however, is not required in order to recognize a state actor's interest in preventing reasonably anticipated harm. *See Watchtower Bible & Tract Soc'y of N. Y., Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 565-66 (6th Cir. 2001) (holding that the village could regulate door-to-door solicitation based on a fear of an "anticipated harm" without proof of actual harm). Finally, TSSAA's newly asserted interest in a level playing field has obviously not been evaluated by either Brentwood or the district court.

The legitimacy of TSSAA's "exploitation" and "level playing field" interests cannot be decided in the abstract as a matter of law. We therefore remand this case to the district court for an evaluation of these asserted interests after TSSAA has had the opportunity to present whatever support it deems appropriate to justify its position.

After the district court decides if either or both of the above interests are legitimate, it should then apply those interests, along with TSSAA's recognized interest in keeping high school athletics in their proper place, to the alleged recruiting rule violations that TSSAA enforced against Brentwood. Its task will be to decide if the punishment exacted for these alleged violations relating to the free game tickets, spring football-practice letters, and the followup telephone calls was appropriate regulatory action narrowly tailored to further TSSAA's legitimate interests as a state actor. This question is also one that cannot be decided in the abstract as a matter of law. TSSAA should therefore be given the opportunity to present whatever support it deems

appropriate to justify the need for such regulations. In proceeding with this case on remand, we caution both the parties and the district court to stay focused on the two alleged recruiting rule violations in question, rather than engage in a wide-ranging attack or defense of the recruiting rule as a whole.

G. The status of Ronnie Carter

As a final point, we note that the district court did not draw any distinction between TSSAA and Ronnie Carter, the Executive Director of TSSAA, in its grant of partial summary judgment to Brentwood. TSSAA now urges us to reverse the district court's judgment to the extent that it operates against Carter in his individual capacity. We decline to do so. Such action by us at this time would be premature, because the district court's opinion is silent on the issue of Carter's liability. We therefore direct the district court on remand to address the issue of Brentwood's claim against Carter in both his official and individual capacities.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the grant of summary judgment in favor of Brentwood and **REMAND** the case to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:97-1249**
	)	**Judge Campbell**
TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,	)	
	)	
Defendants.	)	

ORDER

Pending before the Court are Plaintiff Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) and Defendants' Motion for Summary Judgment (Docket No. 47). The Court heard oral argument on the pending Motions on July 16, 1998.

For the reasons described in the accompanying Memorandum, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is **GRANTED** in part and **DENIED** in part. Brentwood Academy's Motion is **GRANTED** as to its claim that TSSAA's Recruiting Rule violates the First Amendment

on its face, and as applied to Brentwood Academy. Accordingly, Defendants are hereby enjoined from any use of the Recruiting Rule. All sanctions imposed by the TSSAA on Brentwood Academy pursuant to the August 27, 1997 letter from the TSSAA to Brentwood Academy (Docket No. 1, Ex. G) are void and unenforceable.

Defendants' Motion for Summary Judgment (Docket No. 47) is **GRANTED** in part and **DENIED** in part. Defendants' Motion is **GRANTED** as to Plaintiff s equitable estoppel claim and that claim is **DISMISSED**.

The disposition of other issues presented by the pending Motions is discussed in the Memorandum.

It is so **ORDERED**.

/s/
Todd J. Campbell
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:97-1249**
	)	**Judge Campbell**
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,	)	
	)	
Defendants.	)	

MEMORANDUM

I. Introduction

Pending before the Court are Plaintiff Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) and Defendants' Motion for Summary Judgment (Docket No. 47). The Court heard oral argument on the pending Motions on July 16, 1998. For the reasons described herein, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is **GRANTED** in part and **DENIED** in part, and Defendants' Motion for Summary Judgment (Docket No. 47) is **GRANTED** in part and **DENIED** in part.

Brentwood Academy sued the Tennessee Secondary Schools Athletic Association ("TSSAA") and its Executive Director, Ronnie Carter, alleging violation of Plaintiff s First Amendment rights of free speech (Count I); violation of Plaintiff s Fourteenth Amendment substantive and procedural due process rights (Counts II and III); violation of federal antitrust laws (Count IV); equitable estoppel (Count V); and unfair, unreasonable, arbitrary and oppressive action in violation of state law (Count VI). Plaintiff seeks a permanent injunction barring the TSSAA from enforcing its "Recruiting Rule," as written and as applied to Plaintiff; money damages; attorneys' fees and costs. All the above claims, except the antitrust claims, are the subject of the pending motions.

II. Facts

Plaintiff Brentwood Academy is a co-educational, independent, college-preparatory school located in Brentwood, Williamson County, Tennessee. Combined Stipulations (Docket No. 24), ¶ 3. Brentwood Academy is a member of Defendant TSSAA, and the school's interscholastic athletic teams regularly participate in athletic contests regulated by the TSSAA. Id., ¶ 9.

Defendant TSSAA is a non-profit corporation organized and existing under the laws of the State of Tennessee, with its principal place of business in Hermitage, Davidson County, Tennessee. Id., ¶ 10.

Defendant Ronnie Carter is the Executive Director of the TSSAA and, at all times relevant to this action, acted as an employee and agent of the TSSAA and within the scope of his authority as an employee and agent. Id., ¶ 11.

The TSSAA is an association of public, independent and parochial secondary schools from across the state of

Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools compose 84% of the voting membership of the TSSAA, and independent and parochial schools compose 16% of the voting membership of the TSSAA. Id., ¶ 12.

The purpose of the TSSAA is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." TSSAA Constitution, Art. I, Section 2.

By electing to be a member of TSSAA, each member school agrees to abide by the Constitution and By-laws of TSSAA. Combined Stipulations, ¶ 44. The parties have stipulated the authenticity of the TSSAA Constitution and By-laws. Id., ¶¶ 17, 18.

The rules and regulations of the TSSAA are enacted by its Legislative Council, a nine-member body composed of high school principals or assistant principals or qualified superintendents elected by popular vote in each of nine electoral districts. Combined Stipulations, ¶ 14. The administrative authority of the TSSAA is vested in a Board of Control, composed of nine members who are high school principals or superintendents, similarly elected by popular vote. TSSAA Constitution, Art. III.

All the voting members of the Legislative Council and the Board of Control in 1997 were public high school administrators. None of the voting members of the Legislative Council and the Board of Control in 1997 were principals of independent or parochial schools. Combined Stipulations, ¶ 15.

The main question presented in this case is whether the following Recruiting Rule of the TSSAA violates the First Amendment or the Fourteenth Amendment to the United States Constitution:

Recruiting Rule

Section 21. The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting rule?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in

the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective

student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.).

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines For Understanding The "Recruiting Rule" And Understanding "What Is Undue Influence"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal,

admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

TSSAA By-laws, Art. II, Section 21. TSSAA's first version of the "recruiting rule" was adopted in 1935, and the rule in all its forms since 1935 has prohibited "the use of undue influence." Combined Stipulations, ¶ 54.

Since 1925, the State Board of Education has recognized the functions of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools in Tennessee. See Docket No. 52 (Affidavit of Jerome V. Sailors), p. 2. In 1972, by rule, the State Board of Education designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the

public junior and senior high schools of Tennessee participate on an interscholastic basis." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08).

In addition, in 1972, the State Board approved the current rules and regulations of the TSSAA and reserved the right to review the appropriateness of any future changes. Id. On several occasions between 1972 and 1992, the State Board reviewed and approved the TSSAA rules, including the Recruiting Rule at issue in this case. Docket No. 66 (Affidavit of Gary Nixon), attachment, pp. 24-25, 34, 38, 44, 52-53, 73-74, 76-78, 82, 88.

In 1995, the State Board of Education adopted an amendment to Rule 0520-1-2-.08, which deleted the former rule and replaced it with the following: "The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." Tenn. Bd. of Educ. Rule 0520-1-2-.08 and Docket No. 66, attachment, p. 183.

In 1997, certain public high school coaches made allegations of recruiting violations by Brentwood Academy, and those allegations were subsequently communicated to the TSSAA. Combined Stipulations, ¶¶ 35-37. Based on the allegations, the TSSAA, through Defendant Carter, began an investigation. Id., ¶ 38. TSSAA made various claims, but only three allegations ultimately resulted in violations and penalties.

One claim involved the Brentwood Academy football coach, Carlton Flatt, allegedly providing free game tickets to a coach at a public middle school. The allegation was that

Kevin Armstrong, a teacher and coach at Neely's Bend Middle School, used the free tickets for himself and two middle-school student-athletes, allegedly in violation of the Recruiting Rule. Complaint (Docket No. 1), Exs. A, D and G.

Another claim involved a Brentwood Academy basketball coach, John Patton, allegedly conducting impermissible off-season basketball practice with certain Brentwood Academy students in violation of the Off-Season Practice Rule. Id.

A third claim involved letters and telephone calls from the Brentwood Academy football coach, Carlton Flatt, to students from other schools who had contractually agreed to attend Brentwood Academy, to invite them to spring football practice at Brentwood Academy, allegedly in violation of the Recruiting Rule. Id.

In the spring of 1997, the father of an incoming ninth-grade student, who had already been accepted for admission to Brentwood Academy and had committed to attend in the fall, requested permission for his son to participate in Brentwood Academy's spring football practice. Affidavit of Carlton Flatt (Docket No. 30), ¶ 17; and Defendants' Local Rule Response ("Local Rule Response") (Docket No. 46), ¶ 77.

Brentwood Academy contends that in order to avoid an incorrect public perception and to avoid singling anyone out for special attention, the school sent a form letter (the "Spring Practice Letter") to all new incoming male students in grades nine and above, informing them of the dates for spring practice and inviting them to participate if interested. Flatt Affidavit, ¶ 19; and Local Rule Response, ¶ 80.

It is not a violation of the Recruiting Rule for incoming students to participate in school activities at Brentwood Academy, including spring football practice, prior to the time that they actually begin school at Brentwood Academy. See Docket No. 31, Ex. O (Carter Deposition), p. 39; and Local Rule Response, ¶ 75. The alleged violation of the Recruiting Rule is the invitation to attend football practice, not the football practice itself.

The Spring Practice Letter was mailed on or about April 23, 1997, to all new incoming male students who had signed contracts to attend Brentwood Academy. Docket No. 31, Ex. Q (Brasher Deposition), p. 63; Local Rule Response, ¶ 81.

The full text of the Spring Practice Letter reads as follows:

> Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.
>
> Spring practice will begin May 1, 1997 and conclude and May 14, 1997. Practice begins at 3:30 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an *Eagle*.

Your Coach,

/s/ Carlton Flatt

Docket No. 31, Ex. J; and Local Rule Response, ¶ 82.

Prior to receiving the Spring Practice Letter, each of the students and their parents had already made initial contact with Brentwood Academy to express interest in attending, applied for admission, visited the campus, taken the admissions test, been accepted by Brentwood Academy, and entered into a contract to attend the school. Flatt Affidavit, ¶ 20; and Local Rule Response, ¶ 83.

After receiving the Spring Practice Letter, a parent telephoned Coach Flatt to ask whether it was important for his son to attend spring practice at Brentwood Academy if it conflicted with an activity in which the student was involved at his middle school. Flatt Affidavit, ¶ 22; and Local Rule Response ¶ 85.

Although the Letter indicated that spring practice was optional, Coach Flatt believed, in light of that telephone call, that all of the students who received the Letters should again be contacted and informed that they should not participate in spring practice if it conflicted with activities at their respective middle schools. Flatt Affidavit, ¶ 23; and Local Rule Response, ¶ 86.

Coach Flatt chose to telephone the students because there was not enough time before the start of spring practice to send another letter. Flatt Affidavit, ¶ 24; and Local Rule Response, ¶ 87.

On July 29, 1997, Brentwood Academy was notified by letter from Defendant Carter that the TSSAA had found Brentwood Academy guilty of six violations of TSSAA Rules. Complaint (Docket No. 1), Ex. A. Specifically, as it relates to the issues before this Court, the TSSAA found that Brentwood Academy violated the Recruiting Rule through the provision of free game tickets and the football Spring Practice Letter and telephone calls; and violated the Off-Season Practice Rule through the basketball practices mentioned above. Id.

As punishment for these violations, TSSAA imposed the following penalties: (1) Brentwood Academy would not be permitted any off-season practice in football or basketball for two years; (2) Brentwood Academy was placed on probation for two years and fined $3,000; (3) no Brentwood Academy athletic team would be permitted to enter the tournament series for 1997-98, and the football and boys' basketball teams would not be permitted to enter the playoffs and tournament series for 1998-99; and (4) the middle-school students who were given free game tickets were declared ineligible to participate in athletics at Brentwood Academy at any level. Id.

Brentwood Academy appealed this imposition of sanctions in compliance with a two-step appellate procedure set forth in Article VI of the TSSAA Constitution. Complaint, ¶ 82; Answer, ¶ 82. The first appeal was held on August 13, 1997, before Defendant Carter and an advisory committee comprised of three members of the TSSAA Board of Control. Id.; Local Rule Response, ¶ 92.

Defendant Carter was solely responsible for deciding the appeal. Complaint, ¶ 83; Answer, ¶ 83; and Local Rule Response, ¶ 93. Although Defendant Carter was free to consult with the three board members who were present, he was not bound by their advice. Complaint, ¶ 83; Answer, ¶ 83; and Local Rule Response, ¶ 94.

As a result of this procedure, TSSAA changed the penalties as follows: (1) one of the four middle-school students was deemed eligible to participate in Brentwood Academy sports at all levels; the three others were deemed eligible to participate at the junior varsity level only; (2) Brentwood Academy was placed on probation for four years, and the football and boys' basketball teams were denied the privilege of participating in the playoffs and tournament series for the 1997-98 and 1998-99 school years and forbidden from sharing in the tournament revenues or expense allotments for the 1999-2000 school year; (3) all other Brentwood Academy sports teams were allowed to participate in tournament series games, but they could not share in the tournament revenues or receive any expense allotments from the state tournament series; (4) Brentwood Academy was not permitted any off-season practice in football and basketball for two years; and (5) administrative personnel of Brentwood Academy were required to meet with Defendant Carter to review all policies and procedures in regard to the athletic program. August 14, 1997 letter from Defendant Carter to Bill Brown, Headmaster, Complaint (Docket No. 1), Ex. D.

Under TSSAA procedures, Brentwood Academy next appealed to the full Board of Control at a hearing held on August 23, 1997. Combined Stipulations, ¶ 42; Local Rule Response, ¶ 97. All of the voting board members who participated in the Brentwood Academy hearings are principals of public high schools; none are principals at

independent or parochial schools. Combined Stipulations, ¶ 15; Local Rule Response, ¶ 99.

Defendant Carter was present during the Board of Control's deliberation process. Docket No. 31, Ex. O, p. 15; and Local Rule Response, ¶ 101. Defendant Carter answered questions from members of the Board of Control during the deliberation process. Docket No. 31, Ex. O, pp. 15-16; and Local Rule Response, ¶ 102.

The Board of Control found three violations of TSSAA rules: (1) student-athletes being admitted free of charge to athletic contests; (2) contact with student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools;[1] and (3) Brentwood Academy coaches conducting impermissible off-season practice with Brentwood Academy student-athletes. Letter of August 23, 1997, from Mike Reed to Bill Brown, Headmaster, Complaint (Docket No. 1), Ex. G.

The Board of Control ultimately imposed the following penalties on Brentwood Academy:

1. The entire athletic program of Brentwood Academy was put on probation for four years.

2. Brentwood Academy's football and boy's basketball programs were suspended from the TSSAA playoff series for the 1997-98 and 1998-99 school years.

3. Brentwood Academy was fined $3,000.

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[1] TSSAA has stated that Coach Flatt had no intention of violating the Recruiting Rule by mailing the Spring Practice Letters and making the telephone calls. Combined Stipulations, ¶ 40.

4. Brentwood Academy's football and boys' basketball programs were not permitted to engage in off-season practice in the 1997-98 and 1998-99 school years.

5. Appropriate administrative officials of Brentwood Academy were to meet with the TSSAA Executive Director to develop an administrative control plan to help guard against future problems.

Complaint, ¶ 89; Answer, ¶ 89; and Local Rule Response, ¶ 103. These penalties were not itemized by type of violation in the final decision of the TSSAA against Brentwood Academy. Id.

Brentwood Academy filed this action on December 12, 1997. On June 1, 1998, Brentwood Academy moved for partial summary judgment and for a permanent injunction, contending that the Recruiting Rule violates Plaintiff's First Amendment free speech rights and Plaintiff's Fourteenth Amendment substantive due process rights and that Article VI of the TSSAA Constitution, as applied in the disciplinary proceeding herein, violates Plaintiff's Fourteenth Amendment procedural due process rights. See Docket No. 27. On June 30, 1998, Defendants moved for summary judgment, contending that they are entitled to judgment as a matter of law on Plaintiff's constitutional and state law claims. See Docket No. 47. The antitrust claim (Count IV) is not the subject of these dispositive motions.

Additional facts are discussed below as necessary.

III. Summary Judgment

As provided in Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202, 211 (1986). Of course, the court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. Id. at 255, 106 S.Ct. at 2513-14, 91 L.Ed.2d at 216.

The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986); Street v. J. C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

The Supreme Court concluded in Anderson that a dispute about a material fact is "genuine" within the meaning of Rule 56 only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 252, 106 S.Ct. at 2510, 91 L.Ed.2d at 211-12. Since the preponderance of the evidence standard is used in this determination, more than a mere scintilla of evidence in support of the non-moving party's position is required. Id. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

Once a motion for summary judgment has been made, "the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e)." Davidson & Jones Dev. Co., Inc. v. Elmore Dev. Co., 921 F.2d 1343, 1349 (6th Cir. 1991). The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at 274; Cloverdale Equip. Co. v. Simon Aerials, Inc., 869 F.2d 934,

937 (6th Cir. 1989). While the disputed issue does not have to be resolved conclusively in favor of the non-moving party to defeat summary judgment, "sufficient evidence supporting the claimed factual dispute" must be shown, thereby requiring resolution of the parties' differing versions of the truth by a jury or judge. Anderson, 477 U.S. at 249, 106 S.Ct. at 2510, 91 L.Ed.2d at 212; First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569, 592 (1968).

IV. State Action

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 ("Section 1983") for alleged violation of Plaintiff's constitutional rights. Under Section 1983, a plaintiff must allege that he was deprived of a right secured by the U.S. Constitution or laws by a person acting under color of state law. 42 U.S.C. § 1983. Section 1983 erects no shield against merely private conduct, however discriminatory or wrongful. Mineo v. Transp. Mgmt. of Tenn., Inc., 694 F.Supp. 417, 423 (M.D. Tenn. 1988).

Thus, the initial question for the Court is whether the Defendants TSSAA and Carter are "state actors" subject to constitutional limitations under Section 1983. The Court finds that the TSSAA and Carter act under color of state law.[2]

The district courts in Tennessee have consistently held that the TSSAA acts under color of state law. In Kelly v. Metropolitan County Bd. of Educ. of Nashville and Davidson County, 293 F.Supp. 485, 491 (M.D. Tenn. 1968),

[2] The parties have stipulated that Defendant Carter is the Executive Director of TSSAA and, at all times relevant to this action, acted as an employee and agent of TSSAA and within the scope of his authority as an employee and agent. Combined Stipulations (Docket No. 24), ¶ 11.

this Court held that TSSAA was subject to the constitutional limitations placed upon state action. Citing comparable cases in Louisiana and Oklahoma, Judge Miller noted:

> The TSSAA was organized for the primary purpose of performing a public function. Its stated objective is to "stimulate and regulate the athletic relations of the secondary schools of Tennessee." The vast majority of the schools belonging to the association are public schools constituting a part of the State's secondary school system.
>
> The Association's Board of Control and Legislative Council must be composed of school principals or superintendents. While the Executive Secretary of the association is not an employee of the State Board of Education, his salary and the other expenses of the association are paid from revenues primarily derived from games between member schools. Many of the games are played in state-owned buildings or on state-owned properties, and by the use of state-owned facilities.

Id. The factors cited in Kelly are also present in this case.

In another decision of this Court, Crocker v. Tennessee Secondary Schools Athletic Ass'n, 735 F.Supp. 753 (M.D. Tenn. 1990), aff'd, 908 F.2d 972 and 973 (Table) (6th Cir. 1990), Judge Nixon held that the TSSAA was a state actor for two reasons: (1) the State delegated to TSSAA its authority to regulate the eligibility of the public high school student to participate in interscholastic athletics and recognized TSSAA as the only organization to supervise and regulate athletic activities in which the public junior and

senior high schools of Tennessee participate on an interscholastic basis; and (2) the composition of TSSAA's membership and leadership demonstrates that it is a state actor. Id., p. 759. The delegation of authority referenced in Crocker was evidenced by a rule of the Tennessee State Board of Education. Crocker, 735 F.Supp. at 759 (citing Tennessee Board of Education, Rules, Regulation and Minimum Standards, 0520-1-2-.26(l)).

In Graham v. Tennessee Secondary School Athletic Ass'n, 1995 WL 115890 (E.D. Tenn. 1995), appeal dismissed (mootness), 107 F.3d 870 (Table), 1997 WL 76958 (6th Cir. 1997), Judge Edgar found that the TSSAA was a "state actor" for purposes of Section 1983, under the "state compulsion test," set forth by the U.S. Supreme Court in Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). That test requires that the State must exercise some coercive power or provide such "significant encouragement," either overt or covert, that the choice of the private actor is deemed to be that of the state as a matter of law. Id., 457 U.S. at 1004, 102 S.Ct. at 2786.

Judge Edgar found that the TSSAA met this test for two reasons. First, noting that the State had delegated its authority to regulate eligibility of high school students to participate in interscholastic athletics to TSSAA,[3] the court held that the rules and regulations promulgated by TSSAA and their enforcement by TSSAA are "fairly attributable" to the State of Tennessee. Graham, p. *5. Second, the court found that the composition of TSSAA's membership demonstrates that it is acting under color of state law: "TSSAA includes among its membership every public high school in Tennessee. The Legislative Council and the Board of Control of TSSAA are composed of the principals of

[3] The court relied upon the same State Board of Education Rule cited in Crocker.

public schools. Thus, state employees, the public school principals, have some direct control over the development and implementation of TSSAA rules and regulations." Id., p. * 5. The court also noted that even though TSSAA argued it did not receive any revenues directly from the State, it actually received the majority of its revenues from membership fees paid by public schools and from gate receipts at certain games between member schools, many of which are held in state-owned facilities. Id., p. * 6. These same factors are present in this case.

Defendants argue that Graham and Crocker do not apply because the State no longer "delegates" its authority to the TSSAA. Citing an amendment to the State Board of Education rule relied upon in those cases, Defendants argue that the State now merely authorizes the public schools to voluntarily maintain membership in the TSSAA. See Tennessee Board of Education, Rule 0520-1-2-.08.

A review of the history of the relationship between TSSAA and the State is informative. Since 1925, the State Board of Education has recognized the functions of the TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools in Tennessee. Affidavit of Jerome V. Sailors (Docket No. 52), p. 2. In 1972, the State Board of Education, by rule, designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08). The authority granted expressly was to remain in effect until revoked. Id.[4] The

[4] The State Board also determined that the Chairman of the State Board of Education "shall designate" a person or persons to serve in an ex-officio capacity on the TSSAA Board of Control and Legislative Council. Docket No. 52, p. 2.

TSSAA claims that authority was revoked in April of 1995, when the State Board of Education changed its rule. Even if that interpretation is true, however, for at least twenty-four years, the State expressly designated authority to TSSAA to regulate interscholastic athletics in the public schools.

Despite Defendants' bold statements to the contrary, clearly the State Board of Education has reviewed and approved rules and regulations of the TSSAA since at least 1972. The rule promulgated by the Board in 1972 stated: "The State Board of Education approves the current rules and regulations as stated in the Official Handbook of the Tennessee Secondary School Athletic Association and reserves the right to review the appropriateness of any future changes." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08). Based upon Defendant Carter's "history" of the Recruiting Rule at issue in this case [see Docket No. 51 (Affidavit of Ronnie Carter)], it is apparent that the Recruiting Rule was included in the rules and regulations approved by the State Board.

In 1984, the TSSAA briefed the State Board of Education on TSSAA goals, purposes and procedures. See Docket No. 66 (Affidavit of Gary Nixon), attachment, p. 10. Subsequent minutes of the State Board of Education meeting of May 27, 1988, state:

> In 1984 the Board delegated to TSSAA the authority to promulgate rules relative to secondary school athletic events. That action called for a periodic review and approval of the operational authority delegated to TSSAA. The staff of the State Board of Education conducted the review and recommended that the TSSAA rules be approved and the TSSAA be designated to

> continue as the agency to govern secondary athletics for the Board.

Id., pp. 24-25.

On the agenda for the May 26, 1989 meeting of the State Board was the "annual review and report on Tennessee Secondary Schools Athletic Association Rules." Id., pp. 28, 30 and 34. On May 31, 1991, the Board approved the rules and regulations of the TSSAA, including the Recruiting Rule. Id., p. 38, 52-53. A memo from then-Executive Director Brent Poulton to Board members concerning that May 31, 1991 meeting states: "In effect, this amounts to reaffirmation of the Board's decision to delegate responsibility for management of secondary school athletics to TSSAA." Id., p. 44.

The State Board of Education again approved the rules and regulations of the TSSAA, as late as its March 27, 1992 meeting, where the TSSAA appeared through its Associate Executive Director, Bob Baldridge, provided a report to the Board, and reviewed the current status of the TSSAA rules and regulations. Id., p. 88. Upon motion, the TSSAA rules were adopted and approved by the State Board of Education unanimously. Id., pp. 73-74, 76-78, 82, and 88. Again, the State approval included the Recruiting Rule.

In his memorandum to Board members concerning this March 27, 1992 meeting, then-Executive Director Poulton stated: "This is somewhat ceremonial, though important as a means of reminding the world that the

TSSAA works as an agent on behalf of the State Board of Education." Id., p. 82 (emphasis added).[5]

In his memorandum to State Board members regarding their May 21, 1993 meeting, then-Executive Director Poulton stated: "Competitive athletics is a big part of the high school experience. The Tennessee Secondary Schools Athletic Association (TSSAA) manages these activities as sanctioned by the State Board of Education. This annual report keeps members informed of issues and changes in TSSAA policies." Id., p. 117.

It is disingenuous, at best, for Defendants to repeatedly state in their briefs, based upon testimony of Defendant Carter, TSSAA Executive Director, and Mr. Sailors, State Board of Education Executive Director, that the State has never reviewed or approved TSSAA rules. Such an assertion is utterly false, as demonstrated by the minutes of the State Board of Education.

In 1995, apparently in response to Crocker and Graham, the State Board of Education proposed and adopted an amendment to Rule 0520-1-2-.08 by deleting the existing rule and replacing it with the following: "The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." See Affidavit of Gary Nixon (Docket No. 66), attachment, pp. 134-37, 145, 148, 151-54, 162, 171, 173-74, 182-83.

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[5] The Court strongly disagrees that the vote of a state entity acknowledging that another body is its "agent" is "ceremonial." In any event, it is state action.

Although the language of the rule was changed to no longer "designate" TSSAA as the official organization for supervision and regulation of secondary school athletics, it clearly singles out the TSSAA by name to serve this function. More importantly, the conduct of the parties has not materially changed. As indicated below, the connections between TSSAA and the State are still pervasive and entwined. Nothing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed.

In short, the rule amendment had no material effect upon whether TSSAA is a "state actor" for purposes of Section 1983. The State of Tennessee, through custom and practice, then explicitly, and then through custom and practice again, has recognized TSSAA as the official body for the regulation and control of interscholastic athletics. A mere change in the words of the regulation, apparently to avoid a litigation claim of state action, did not change the actual conduct of the State and did not change the actual conduct of the TSSAA, which constitutes state action. To hold otherwise would raise form over substance.

The decisions in both Crocker and Graham rely upon other factors besides the "delegation" argument.[6] In both decisions, the courts noted the composition of TSSAA's membership and leadership as a basis for state action. See Crocker, 735 F.Supp. at 759; Graham, 1995 WL 115890 at ** 5-6. Nothing about the composition and leadership of TSSAA has changed since Crocker and Graham.

It is undisputed that the overwhelming majority (84%) of the members of TSSAA are public schools. Combined Stipulations (Docket No. 24), ¶ 12. Members of

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[6] Defendants erroneously stated at oral argument that Graham was based solely on a "designation" theory.

TSSAA must be schools accredited by the State Board of Education. TSSAA Bylaws, Art. 1, Section 1.

TSSAA is governed by a Board of Control and a Legislative Council, elected by the members. TSSAA Constitution, Arts. III and IV. In 1997, all members of the Board of Control and the Legislative Council were principals of public schools. Combined Stipulations, ¶ 15. Thus, the membership of the TSSAA is primarily public schools and the governance of the TSSAA is exclusively by public officials. In addition, the TSSAA admits it is the only organization providing these benefits to the public secondary schools in Tennessee.[7]

The Sixth Circuit Court of Appeals addressed the issue of state action in interscholastic athletics in Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981), where it found that "[t]he OHSAA's character as a semi-official in its activities and its symbiotic relationship with the state lead to the conclusion that the trial judge correctly found state action." Id., p. 653. The court cited many examples of the "symbiotic relationship" between the OHSAA and the state, including the OHSAA's organization of competitions, setting of schedules, arrangement of places to play tournament games, prescription of uniform rules of play, and power to sanction schools which violate those rules. Id. In addition, the court noted that to be a member of OHSAA, a school must be accredited by the State Board of Education and that membership in OHSAA is a virtual necessity, since the State Board does not provide any interscholastic athletic programs. Id. The same indications of a symbiotic relationship exist in this case.

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[7] TSSAA made this admission at oral argument.

After Yellow Springs, in Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986), the Sixth Circuit held that the National Collegiate Athletic Association ("NCAA") was not a state actor. Specifically, the court held that the NCAA conduct was not traditionally and exclusively the state's prerogative and that the state did not cause, control or direct the NCAA's action. Id., p. 958. The Court finds significant the fact that Graham involved the NCAA, a national athletic association, and not a state association.

The Supreme Court, in holding that a national athletic association (the NCAA) was not a "state actor," specifically noted: "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 194, n. 13, 109 S.Ct. 454, 463, n. 13, 102 L.Ed.2d 469 (1988) (citing Clark v. Arizona Interscholastic Assn, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818, 104 S.Ct. 79, 78 L.Ed.2d 90 (1983) and Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968)).

This Court agrees with the analysis in Tarkanian. Thus, Defendants' reliance upon cases involving the NCAA is misplaced. In Brewer v. Purvis, 816 F.Supp. 1560, 1575 (M.D. Ga. 1993), aff'd, 44 F.3d 1008 (11th Cir. 1995), cert. denied, 514 U.S. 1111, 115 S.Ct. 1965, 131 L.Ed.2d 855 (1995), the court held that the Georgia High School Association and its employee were state actors for purposes of the Fourteenth Amendment, noting that "[t]raditionally, courts have found that high school athletic associations are state actors." The court distinguished Tarkanian because it involved the NCAA, specifically noting footnote 13 in that case, and stated: "Thus, an athletic association whose membership is predominated by institutions created by the

same sovereign is a state actor." Id. Also distinguishing Tarkanian on that same basis are Habetz v. Louisiana High School Athletic Ass'n, 915 F.2d 164, 166-67 (5th Cir. 1990) and Libby v. South Inter-Conference Ass'n, 728 F.Supp. 504 (N.D. Ill. 1990), aff'd., 921 F.2d 96 (7th Cir. 1990).

In 1989, the Sixth Circuit, relying exclusively upon Graham v. NCAA, held that the Ohio High School Athletic Association ("OHSAA") did not act under color of state law. Burrows v. Ohio High School Athletic Ass'n, 891 F.2d 122 (6th Cir 1989). The Burrows court relied upon a case involving a national association, not a state association, and the opinion does not mention Tarkanian or Yellow Springs[8] at all. The Court finds that Burrows does not dictate the outcome of this case based on the facts presented here.[9]

In Clark and St. Augustine, the cases cited by the Supreme Court in Tarkanian, the courts listed numerous factors which indicated that the association's functions were "intertwined" with the state's actions: (1) composition of the association's membership primarily public schools; (2) public school principals — state officers, state paid and state supervised comprise association leadership and play substantial role in determining and enforcing policies and

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[8] This omission is significant since the court had earlier held, in Yellow Springs, that the same athletic association (OHSAA) was a state actor. There is no explanation for the apparent conflict with the previous decision.

[9] In Graham v. TSSAA, Judge Edgar distinguished Burrows by citing the Tennessee Board of Education's greater involvement in the association's affairs. Graham, p. * 5. This Court agrees. See also Rhodes v. Ohio High School Athletic Ass'n, 939 F.Supp. 584, 590-91 (N.D. Ohio 1996), in which an Ohio district court, after Burrows, held that the OHSAA was a state actor, and Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994), also decided after Burrows.

regulations; (3) association funds come largely from public athletic events, the great majority of which are held at state-owned and state-supplied facilities; (4) paid staff of association covered by state retirement plan; (5) association exercises wide control over scheduling, participation in and conduct of athletic events of public schools; (6) association sets and enforces eligibility rules and limits numbers of games public schools may play; (7) association has power to keep public schools from competing against other schools; (8) association has power to investigate, discipline and punish member schools; and (9) rules and regulations of association bind all public schools, although any school may withdraw from association at any time. See Clark, 695 F.2d at 1128 and St. Augustine, 396 F.2d at 227-228.[10] Almost identical factors are present in this case.

The Court finds overwhelming evidence of the symbiotic relationship between TSSAA and the public, state-controlled school system in this case. For example, the stated purpose of TSSAA is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." TSSAA Constitution, Section 2. TSSAA exercises wide control over scheduling, participation in and conduct of athletic events in public schools. TSSAA Bylaws, Arts. I, II, III and IV. TSSAA prescribes uniform rules of play. Id., Art. III, Section 8. TSSAA regulates the eligibility of public school students to participate in interscholastic athletics. Id., Art. II. TSSAA admits it is the only organization providing these benefits to the public schools of Tennessee.

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[10] In Poret v. Louisiana High School Athletic Ass'n, 1996 WL 169241 (E.D. La. 1996), the court, noting the "new test" of Blum, found that, even under a "fairly attributable" standard, St. Augustine (cited above) is still controlling and the LHSAA is a state actor for purposes of Section 1983. Id., p. * 2 (citing Graham and Crocker).

Officials for athletic contests at TSSAA schools must be selected from the official TSSAA list and paid TSSAA-set fees. TSSAA Bylaws, Art. IV, and Docket No. 68, Exhibit A (June 11-12, 1997 TSSAA minutes). The TSSAA also sets the ticket prices for all regional and state tournament games. Id.

The TSSAA has the power to investigate and sanction schools which violate its rules. TSSAA Bylaws, Art. 1, Section 6. Thus, public schools, state agencies, are subject to TSSAA discipline. TSSAA can levy monetary fines against the public schools of Tennessee.

In addition, the TSSAA has the power to keep schools from competing against other schools. Id., Art. III. Its rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics.

TSSAA rules provide that public school principals and coaches submit certain reports to the association on a regular basis. TSSAA Bylaws, Arts. III and IV. In fact, the TSSAA Bylaws provide that principals — state-paid, state-supervised, public officials — are responsible to the association in all matters pertaining to athletic relations of their schools.[11] Id., Art. III, Section 8. State employees, therefore, are accountable to the TSSAA. Initial responsibility for assuring compliance with all TSSAA rules and regulations is placed in the hands of the principals. Id., Art. III, Section 9 and Art. IV, Section 8.

A substantial portion of TSSAA's annual revenue comes from tournament receipts from athletic tournaments of member schools. TSSAA Bylaws, Art. III, Section 17; Local Rule Response (Docket No. 46), ¶ 24. The majority of

[11] Although unnecessary to the decision in this case, this regulation, on its face, raises conflict of interest concerns.

athletic contests between member schools are played in public, state-owned facilities. Id., ¶ 25. The TSSAA directly dictates the parameters of all post-season play for public schools. TSSAA Bylaws, Art. III.

Employees of TSSAA, including Defendant Carter, are covered by the State retirement system and, by statute, are included in the definition of "teachers" for that purpose. Tenn. Code Ann. § 8-35-118; Local Rule Response, ¶ 21.

For a school to be member of TSSAA, its coach must have a Tennessee State teaching license, must be a full-time employee of the Board of Education and must be paid entirely from funds approved by the Board of Education or the governing board of the school. TSSAA Bylaws, Art. III, Section 7.

TSSAA admits that interscholastic athletics are intricately connected to the educational process. For example, the Executive Director of TSSAA stated, in a letter to Plaintiff: "High school athletics is a part of the total educational program." See Ex. D to Docket No. 24. In addition, the first Article of the TSSAA Constitution provides:

> Recognizing that the primary objective of all secondary schools is to educate youth, the TSSAA aims to co-ordinate the athletic and scholastic programs. The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and team work. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other.

TSSAA Constitution, Art. 1, Section 2.

By state law, participation in interscholastic athletics and marching band may be substituted for the physical education graduation requirement. Tenn. Bd. of Education Rule 0520-1-3-.06. Thus, students get academic credit for TSSAA activities, and the TSSAA is therefore performing part of a public function, required by state law, as the court in Kelly found.

On July 29, 1994, Defendant Carter, Executive Director of TSSAA, appeared at a State Board of Education meeting, on behalf of TSSAA, to answer questions about TSSAA's lack of minority hiring. See Docket No. 66, attachment, p. 111. The minutes reflect the State Board's "overall concern that TSSAA reflect hiring practices which are the same as those expected for local schools." Id., p. 112. At the September 29, 1994 meeting, Bob Baldridge, Associate Executive Director for TSSAA, appeared again to update the Board on TSSAA's employment practices. Id., p. 128. Thus, the State Board of Education injected itself into the TSSAA's hiring practices as late as 1994.

The TSSAA connection to the State Board of Education is further demonstrated by the fact that the TSSAA treated all Board members to dinner and helped with the expenses of the Board's July 1991 retreat. See Docket No. 66, attachment, pp. 63 and 69.

Mr. Sailors stated in his Affidavit that "no member of the State Board of Education attends meetings either of the TSSAA Board of Control or Legislative Council." Docket No. 52, p. 3. Yet minutes of the TSSAA Board of Control and Legislative Council meetings reveal that statement to be utterly false, since State Board representatives, including Mr. Sailors himself, attended more than twenty TSSAA Board of

Control or Legislative Council meetings from 1990 through 1997. See Exhibit A to Docket No. 68.

The minutes of the June 8, 1990 Board of Control meeting reveal that the State Board of Education representative is, in fact, an ex-officio member of the Board of Control. Id.; see also Docket No. 52, p. 2. Therefore, TSSAA cannot argue that representatives of the State attended these meetings simply as members of the public. Those minutes state the following: "At the present time, there are three ex-officio members serving on the Board of Control and Legislative Council. They are representatives of the State Board of Education, the State Schools Boards Association, and the State Department of Education." Docket No. 68, Ex. A. So, not only is the State Board of Education represented on the TSSAA Board of Control and Legislative Council; the State Department of Education is represented within the governance of TSSAA as well. It is also significant that State representatives continued to attend TSSAA meetings as ex-officio members even after the "delegation" rule was changed in 1995. Docket No. 68, Ex. A.

Therefore, regardless of how the TSSAA denominates itself as an organization, or how it characterizes its relationship with its member schools, "it is abundantly clear that the association's very existence is entirely dependent upon the absolute cooperation and support of the public school systems" of the State of Tennessee. Haas v. South Bend Community School Corp., 289 N.E.2d 495, 498 (Ind. 1972) ("The enforcement of the rules promulgated by the IHSAA and adopted by the member schools may have a substantial impact upon the rights of students enrolled in these tax supported institutions, and we conclude, therefore, that the administration of interscholastic athletics by the IHSAA should be considered to be 'state action' within the meaning of the Fourteenth Amendment.").

The supervision and regulation of interscholastic athletics in secondary schools in Tennessee is provided by the TSSAA, in joint participation with the State. Certainly the conduct of the TSSAA and the State meet the "significant encouragement" and "fairly attributable" tests of Blum.

As the court noted in Barnhorst v. Missouri State High School Activities Ass'n, 504 F.Supp. 449 (W.D. Mo. 1980):

> It is beyond cavil that education is a traditional function of the state. . . . Extracurricular activities are an important component of an education in today's modern society. The close identification of the functions served by MSHSAA with the State's provision of education to all children of school age (not otherwise receiving a private or parochial education) is a sufficient nexus to transmute the challenged rule of MSHSAA into "state action" subject to the constitutional strictures of the Fourteenth Amendment of the United States Constitution.

Id., p. 457.

The close identification of the TSSAA with the State's provision of education is a sufficient nexus to find state action in this case. Accordingly, the Court finds that the actions of the TSSAA, a state athletic association, are so intertwined with the State that they constitute "state action" for purposes of Section 1983. See also Clark, 695 F.2d at 1128; Dennin v. Connecticut Interscholastic Athletic Conf., Inc., 913 F.Supp. 663, 671 (D. Conn. 1996), judgment vacated on other grounds (mootness), 94 F.3d 96 (2d Cir. 1996); Force v. Pierce City R-VI School Dist., 570 F.Supp. 1020, 1030 (W.D. Mo. 1983); Beck v. Missouri State High

School Activities Ass'n, 837 F.Supp. 998, 1001 (E.D. Mo. 1993), judgment vacated on other grounds (mootness), 18 F.3d 604 (8th Cir. 1994); Mississippi High School Activities Ass'n. Inc. v. Coleman, 631 So.2d 768, 774 (Miss. 1994).

V. First Amendment Freedom of Speech

A.

Brentwood Academy contends that the TSSAA Recruiting Rule violates its First Amendment right of freedom of speech. Plaintiff, in particular, emphasizes that by prohibiting school representatives from contacting a student before the student has attended the representative's school for three days, the Recruiting Rule violates the First Amendment on its face, and as applied in this case. Defendants contend that the Rule is a valid time, place and manner restriction. For the reasons described herein, the Court finds that the TSSAA Recruiting Rule violates the First Amendment on its face, and as applied to Brentwood Academy.

The Recruiting Rule appears at Article II, Section 21 of the TSSAA By-Laws, and consists of the "main" Rule, followed by five sets of questions and answers, and "Guidelines For Understanding The 'Recruiting Rule' and Understanding 'What is Undue Influence.'" The main Rule prohibits the use of "undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes."

In answer to Question 1, the phrase "undue influence" is defined as: "exceeding what is appropriate or normal and offering an incentive or inducement to a student

with or without an athletic record." The phrase "appropriate or normal" is not defined in the Rule.

The answer to Question 3 following the Rule attempts to specifically regulate the conduct of coaches. It provides that a "coach may not contact a student or his or her parents prior to his enrollment in the school." The prohibition applies "whether or not [the student has] an athletic record."

"Contact" is not defined in the answer to Question 3, or anywhere else in the Rule. In that regard, paragraph six of the Guidelines provides that "[a]ny meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school." It is not clear whether a member of the coaching staff may "contact" a student who has, at some time prior to enrollment, requested to speak with him or her. See Deposition of Robert Lee Baldridge, III, at 81-83 (attachment to Docket No. 80) (coach may talk with student if student has requested to talk with coach).[12]

"Enrolled" is also undefined in the answer to Question 3. The term is used again, however, in the second example in the answer to Question 4, which prohibits: "Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school) . . ." The TSSAA has taken the position that this

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[12] Indeed, TSSAA Assistant Executive Director Robert Baldridge has testified that a member school does not violate the Rule by sending letters to, or calling, students who have made an "initial contact" with the school — a position contrary to the one taken by the TSSAA in penalizing Plaintiff for sending the Spring Practice Letter and calling students who had already signed enrollment contracts with the school. (Baldridge Deposition, at 83-84).

sentence clearly indicates that the term "enrollment," as it is used throughout the Rule and explanations, requires that the student have attended at least three days of school. (Defendants' Response To Motion For Partial Summary Judgment, at 95-96 (Docket No. 45)). Based on this interpretation by the TSSAA, the restriction under Question 3 prohibits a coach from "contacting" *any* student or parent until that student has attended the coach's school for three days.

Other explanations following the Rule specifically prohibit "initial contact or prearranged contact" by coaches or other representatives of the school with "prospective student/athletes." Specifically, three examples under Question 4 prohibit:

> 3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.
>
> 4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.
>
> Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

> Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.
>
> 5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

"Feeder pattern" is not defined in the Rule, but the parties have stipulated that the Plaintiff has no schools in its feeder pattern. (Defendants' Local Rule 8(b)(7)(c) Response, ¶ 37(Docket No. 46)).[13] Based on these examples, any school representative, including a member of the coaching staff, is prohibited from making an "initial contact" with prospective student-athletes outside the "feeder" pattern for any reason until the student is enrolled at the school.

Plaintiff contends these restrictions on contact by schools violate the First Amendment.

B.

The principle underlying the Supreme Court's First Amendment jurisprudence is that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner

[13] Defendants suggest that the coach at Brentwood Academy can take advantage of the feeder school exception by talking with students who are in the first through sixth grade at the school. But Defendants have not suggested why they should be allowed to withdraw their stipulation. In any event, no reasonable person would interpret the term "feeder school" to mean the first six grades of the *same* school.

Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 114 S.Ct. 2445, 2458, 129 L.Ed.2d 497 (1994). Laws and regulations that "stifle [] speech on account of its message . . . pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." Id. These restrictions "'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" Id. (quoting Simon & Schuster, Inc. v. Members of State Crime Victims Bd., 502 U.S. 105, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991)).

Laws that regulate the content of the message in this way are subjected to the "most exacting scrutiny." Turner Broadcasting, 114 S.Ct. at 2459. To judge those laws, the government must show that they serve a compelling interest, and are narrowly drawn. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987); First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978). To be "narrowly drawn," the law must be the "least restrictive means" to further the government's articulated interest. Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989).

Defendants contend that the Recruiting Rule's prohibition on contact with prospective students is not an attempt to stifle speech, but is a valid time, place and manner restriction. In order to be analyzed as a time, place, and manner restriction, the regulation must be content-neutral. Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989). If the regulation is content-neutral, it is subject to "intermediate" scrutiny: it must be narrowly tailored to serve a significant

governmental interest, and it must leave open ample alternative channels for communication of the information. Id. The means chosen need not be the least restrictive, but may not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward, 109 S.Ct. at 2757-58.

In determining whether a regulation is content-neutral, the "government's purpose is the controlling consideration." Ward, 109 S.Ct. at 2754. A regulation that serves purposes unrelated to the content of the message is deemed content-neutral, even if it has an incidental effect on certain messages or speakers. Id. For example, a government may regulate the level of noise emitted by a sound truck, without regard to the message conveyed by the sound truck, to further its interest in protecting citizens from unwelcome noise. 109 S.Ct. at 2756-57. If the interest to be served by the regulation is based on the listeners' reaction to the speech, however, the purpose of the regulation is not content-neutral. Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 2403, 120 L.Ed.2d 101 (1992). The Court finds that the Recruiting Rule ban is content-based because the interests asserted by the Defendants to support the ban focus on the content of the message and the effect of the message on the listener.

C.

Defendants assert two interests supporting enactment of the Recruiting Rule: ensuring that athletes and non-athletes are treated alike; and preventing the exercise of undue influence on the student-athlete. (Defendant's Response To Motion For Partial Summary Judgment, at 73-75, 79 (Docket No. 45)). Thus, in enacting the ban, the TSSAA was apparently concerned that schools would be more interested in attracting student-athletes than other students, and consequently, school representatives would

attempt to "unduly" influence these student-athletes to attend. Thus, the ban was purportedly enacted to prevent student-athletes from being subjected to the content of the message being conveyed by public and private school representatives outside the student's feeder pattern. The TSSAA's purpose in enacting the ban, then, indicates that the ban is not content-neutral.[14] Thus, Defendants must show that the ban is supported by a compelling governmental interest and is narrowly drawn. Arkansas Writers' Project, Inc., 107 S.Ct. at 1729; Bellotti, 98 S.Ct. at 1421.

The Court recognizes that the State has a compelling interest in ensuring that its children obtain a high quality education so that they may become productive, contributing members of society. That education may include a curriculum that exposes the student to a wide variety of academic subjects, interscholastic athletics, and extracurricular activities.[15] Ensuring that students maintain an appropriate balance between these activities and their "core" academic work is also a legitimate interest of the government. To that extent, the first interest asserted by Defendants has superficial appeal.

That interest is referenced in the Guidelines which follow the Recruiting Rule:

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[14] Even if the ban were content-neutral, it still would not be a valid time, place, and manner restriction because, as discussed more fully below, the ban burdens substantially more speech than is necessary to prevent harm to student-athletes. See also Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 1801, 123 L.Ed.2d 543 (1993) ("Assuming that a flat ban on commercial solicitation could be regarded as a content-neutral time, place, or manner restriction on speech, a proposition that is open to serious doubt," the ban does not "serve a substantial state interest in 'a direct and effective way.'" (citations omitted)).

[15] Students may receive academic credit for interscholastic athletics. Tenn. Bd. of Ed. Rule 0520-1-3-.06.

2. One key is not treating 'athletes' or 'prospective athletes' any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability . . . .

* * * *

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year-old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

To the extent that singling out a student based on his or her athletic ability would harm that student,[16] the State would have an interest in preventing that harm from occurring. Certainly, the State would have an interest in preventing a student's athletic abilities or activities from resulting in an unfair advantage or an unfair disadvantage to the student. Both situations could affect the student's ability

[16] There is no evidence in the record to support the conclusion that singling out students based on their school activities is harmful. Singling out talented student-athletes may well be beneficial rather than harmful.

to benefit fully from his education.[17] Thus, to the extent that Defendants are asserting an interest in ensuring that athletics do not interfere with a student-athlete's ability to obtain a high quality education, they have asserted a compelling state interest.

Defendants also assert that the Recruiting Rule ban is designed to prevent "undue influence." Under Tennessee law, a plaintiff who seeks to invalidate a will based on undue influence on the testator must show "that one person, by threats, coercion or importunities, so exhausted the will of the other person to resist that the act taken by the weaker was not his or her own act but that of the person exercising the undue influence." Bills v. Lindsay, 909 S.W.2d 434, 440 (Tenn. Ct. App. 1993). A similar showing must be made to rescind a conveyance or a contract. See, e.g., Fritts v. Abbott, 938 S.W.2d 420, 421 (Tenn. Ct. App. 1996) (plaintiff must show that the weaker party made the conveyance while under the domination and control of the stronger party). Limited by these definitions, the Court agrees that the prevention of "undue influence" on a student is a valid state interest because conduct constituting "undue influence" could harm the student. In other words, the TSSAA has a substantial interest in preventing a student from being threatened, coerced, or harassed.

On the other hand, the TSSAA does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to

[17] The Court is not persuaded, however, that the State would have an interest in ensuring that students with certain talents are treated exactly the same as every other student. Pursuing this goal to its logical extreme would prevent schools from allowing talented orators to participate on the debate team, or from allowing talented musicians to play in the school band. By offering these extracurricular activities, the State has recognized that developing a student's particular talent enhances the quality of that student's educational experience.

persuade potential students that the educational experience at that school is superior to that to be gained at another school.[18] In other words, it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side of the debate by suppressing the speech of the other. Turner, 114 S.Ct. at 2458-59; Belotti, 98 S.Ct. at 1420-21. The TSSAA cannot control school choice through censorship.

Having determined, however, that Defendants have a legitimate interest in protecting student-athletes from the specific harms identified above, the Court must determine whether the Recruiting Rule's ban is narrowly drawn to accomplish those goals. The answer is clearly no. The interests identified by Defendants are, at best, only marginally promoted by the ban, and "could be sufficiently served by measures less destructive of First Amendment interests." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980).

There is absolutely no evidence in the record that the Recruiting Rule ban was enacted in response to evidence that student-athletes were being harmed as a result of initial contact by school representatives, including the school's coaching staff. See Edenfield, 113 S.Ct. at 1800-01 (failure to present studies or anecdotal evidence substantiating State's allegations of harm belies government's argument that restriction directly and materially alleviates that harm). See also Ibanez v. Florida Dep't of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136, 114 S.Ct.

[18] The State's interest, in fact, is the reverse. The State has a profound interest in students making informed choices about education.

2084, 2091, 129 L.Ed.2d 118 (1994) ("[w]e have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here.") It is difficult to imagine that a student-athlete would be harmed simply by hearing that a school outside his zone would be interested in him or her. It is difficult to imagine that a student-athlete who did not have the financial means to attend a private or parochial school would be harmed simply by an offer of financial aid that would allow him to attend the school.

There is also no evidence in the record that the ban prevents athletes from obtaining an "unfair" advantage over other students. In fact, the ban has the result of penalizing athletes by prohibiting them from being approached with offers of educational opportunities when schools may freely approach, and make offers to, students with other talents.[19] Student-athletes are being punished, rather than favored, for their talents.

Furthermore, Defendants have not explained the purpose for the feeder school exception. If conveying information to student-athletes about opportunities to attend out-of-zone schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of "feeder schools." The TSSAA cannot have it both ways.

Certainly, the TSSAA's legitimate interest in preventing harm to student-athletes can be better served by means less intrusive than the Recruiting Rule ban. For instance, fraudulent conduct and intimidation could be

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[19] In that regard, the Court notes that listeners, as well as speakers, have First Amendment interests that deserve protection, interests that may be asserted by those who wish to reach those listeners. See, e.g., Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 1823 n.15, 48 L.Ed.2d 346 (1976).

prohibited, and the TSSAA could require parental involvement, if necessary. See Schaumburg, 100 S.Ct. at 836-47; Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S.Ct. 2667, 2676, 101 L.Ed.2d 669 (1988). The Court agrees with Plaintiff that the Rule's ban has the effect of preventing any influence on a student, not just "undue" influence. The ban is simply not the "least restrictive means" for preventing harm to student-athletes. The TSSAA needs to go back to the drawing board and start over.

Thus, the Court concludes that the Recruiting Rule ban cannot be applied in a valid manner, and is therefore, facially unconstitutional. See, e.g., Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984).

The ban also violates the First Amendment as applied to the facts in this case because there is no evidence that penalizing the conduct at issue here even remotely furthered the legitimate interests identified above. The letter sent by Coach Flatt invited students who had already signed enrollment contracts with the school to Spring football practices, advised the students that they were not required to attend the practices, and set forth the schedule for practices. The phone calls Coach Flatt made after sending the letter were simply to reiterate to the recipients that they should not participate in practices if their participation conflicted with activities at the schools they were currently attending.

There is no evidence in the record to suggest that these students were, or were likely to be, harmed by receiving information about Plaintiff s Spring football practice. The Spring Practice Letter, and follow-up telephone calls, could not have constituted "undue influence" of the students to attend Brentwood Academy. The students who received the letters and calls had already contractually

agreed to attend the school. Whatever influence the letters and calls had was "due," rather than "undue," given the legitimate need for a school to communicate such information to its students.

Furthermore, Defendants have admitted that the Recruiting Rule does not prohibit incoming students from participating in spring football practice at a school they plan to attend the next fall.[20] Therefore, the TSSAA has prohibited speech with regard to conduct it recognizes as lawful under the regulations. Defendants have asserted no legitimate justification for penalizing Plaintiff's communication about this admittedly legal activity.

Defendants also argue that the restriction is justified because the State may specify those who are allowed to speak under certain circumstances, citing Minnesota State Board For Community Colleges v. Knight, 465 U.S. 271, 104 S.Ct 1058, 79 L.Ed.2d 299 (1984); Cornelius v. NAACP Legal Defense Ed. Fund, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); and Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). These cases do not advance the analysis here because they all involve the extent to which the government may limit access to public property, or may limit access to government officials or employees by those wishing to express their views. The ban in this case does not limit access to public property or public officials or employees. It limits access by certain speakers to certain potential listeners. Indeed, by restricting the speech of coaches, it limits the most informed speakers on the subject of athletics. As discussed above, the First Amendment is

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[20] The Court notes the absurdity of TSSAA's position that coaches cannot contact students until they attend school for three days, but these same students can attend spring practice. How can a coach hold a practice with students that he or she cannot contact?

much less tolerant of the restrictions involved here. See Belloti, 98 S.Ct. at 1420. (The government is "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.")

D.

Defendants also argue that even if the Rule's ban is content-based, it should be analyzed under the more relaxed scrutiny applied to "commercial speech" under the First Amendment. The Supreme Court has explained that "'the test for identifying commercial speech'" is whether the communication involves "the proposal of a commercial transaction." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 1513, 123 L.Ed.2d 99 (1993) (quoting Board of Trustees of State University of N.Y. v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)).

The Court is not persuaded that the ban in this case should be characterized as regulating only commercial speech. The ban is not limited to a school's advertisements and/or solicitations, but covers all speech by a school representative with a student until the student has attended the representative's school for three days. Indeed, as Plaintiff points out, the communication for which Plaintiff was punished in this case did not involve solicitation or recruiting, but merely conveyed information about spring football practice to students who had signed enrollment contracts with the school. Furthermore, the ban also applies to coaches of public schools who seek to contact students attending schools that are not "feeder schools." Since public school students do not pay tuition, a student's enrollment in a particular public school would not constitute a"commercial" transaction. By the same token, it is not at all clear that a student's enrollment in a private school that provided a full scholarship to the student would constitute a "commercial"

transaction. Thus, the Rule's ban does not limit purely commercial speech.[21]

Even if Defendants are correct in their characterization of the speech involved here, however, the ban does not survive even the more relaxed scrutiny accorded commercial speech regulations. Regulation of commercial speech is subjected to "intermediate" scrutiny under a framework set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 2375-76, 132 L.Ed.2d 541 (1995).[22] Under Central Hudson, commercial speech that concerns a lawful activity and that is not misleading may be regulated if the government demonstrates that:[23] (1) it has a substantial interest in

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[21] As the Supreme Court has pointed out, speech does not retain its commercial character "when it is inextricably intertwined with otherwise fully protected speech." Riley, 108 S.Ct. at 2677.

[22] Since Virginia Board of Pharmacy, 96 S.Ct. at 1817, the Court has held that accurate and non-misleading commercial messages are protected by the First Amendment. Only false, deceptive or misleading commercial speech may be banned. Ibanez, 114 S.Ct. at 2088.

Defendants do not contend that the ban is justified because it reaches only unprotected false, deceptive or misleading speech.

[23] It is well established that the party seeking to uphold a restriction on protected commercial speech has the burden of justifying it. Ibanez, 114 S.Ct. at 2088 n.7. As the Supreme Court stated in Ibanez, 114 S.Ct. at 2089:

> The State's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'

support of its regulation; (2) the restriction on commercial speech "directly and materially advances that interest;" [24] and (3) the restriction is "'narrowly drawn."[25] Florida Bar, 115 S.Ct. at 2376. Unlike rational basis review, this intermediate level of scrutiny does not permit the court "to supplant the precise interests put forward by the State with other suppositions." 115 S. Ct. at 2376.

As discussed above, the Court recognizes that the State has a compelling interest in preventing conduct that is harmful to a student-athlete. Also, as explained above, however, the ban does not directly and materially advance that interest, nor is it narrowly drawn. Accordingly, even if the ban could be construed as involving commercial speech, it would still violate the First Amendment.

Defendants cite Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) to support their argument that "a prohibition on the exercise of 'undue

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(quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S.Ct. 2265, 2279, 85 L.Ed.2d 652 (1985)).

[24] Under the second prong of the Central Hudson test, Defendants must show that the regulation directly and materially advances the articulated interests. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 1509, 134 L.Ed.2d 711 (1996). Defendants may not rely on speculation and conjecture in making this showing, but "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield, 113 S.Ct. at 1800-01. In that regard, the Court has explained that "broad prophylactic rules may not be so lightly justified if the protections afforded by commercial speech are to retain their force." Zauderer, 105 S.Ct. at 2281.

[25] In Fox, 109 S.Ct. at 3034-35, the Court made it clear that commercial speech analysis does not require that the regulation meet the "least restrictive means test." Instead, there must be a "fit' between the legislature's ends and the means chosen to accomplish those ends. Id. See also 44 Liquormart, 116 S.Ct. at 1509.

influence' in the context of commercial speech has been upheld under the First Amendment." (Defendants' Response To Motion For Partial Summary Judgment, at 79 (Docket No. 45). In Ohralik, the Ohio Supreme Court disciplined an attorney for approaching an 18-year old accident victim in the hospital, offering to represent her, and during a later visit, obtaining her signature on a contingent fee agreement. 98 S.Ct. at 1915-16. The attorney visited another victim of the accident, also 18-years old, at home and also secured her signature on a contingent fee agreement. Id. Ohralik was disciplined for violating a rule prohibiting a lawyer from recommending himself or his associates to one who has not sought his advice, and a rule that prohibits the acceptance of employment by a lay person to whom the attorney has given unsolicited advice. 98 S.Ct. at 1917 n.9. Neither of these rules used the phrase "undue influence."

The Ohralik Court held that the State does not violate the First Amendment by disciplining a lawyer "for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." 98 S.Ct. at 1915. In reaching its decision, the Court determined that the State had a legitimate interest in "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" 98 S.Ct. at 1921.

As explained above, this Court agrees that the TSSAA has an interest in preventing students from harmful solicitations involving fraud, undue influence, intimidation or overreaching, but Defendants have not shown that the Recruiting Rule ban properly accomplishes that goal. As the Supreme Court explained in a more recent case, this goal does not justify blanket bans on all personal solicitations: "the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation." Edenfield, 113 S.Ct. at

1802. In striking down a ban on in-person solicitation by Certified Public Accountants, the Court in Edenfield made it clear that the Ohralik holding was limited: "Ohralik's holding was narrow and depended upon certain 'unique features of in-person solicitation by lawyers' that were present in the circumstances of that case." Id. (quoting Zauderer, 105 S.Ct. at 2277). The "unique features" of the in-person solicitation in Ohralik were that a lawyer, who "is trained in the art of persuasion," personally solicits an "unsophisticated, injured, or distressed lay person" and seeks the person's immediate acceptance of a retention agreement. Id.

Unlike Ohralik, there is no evidence in the record that a student's parents, who must make the ultimate decision about which school their child will attend, would be vulnerable to, and oppressed by, school representatives, or that there would be pressure to make a decision on the spot. See Edenfield, 113 S.Ct. at 1803 (". . . Ohralik in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem.")

Moreover, the facts in this case are that the Spring Practice Letter, and follow-up calls, all went to students who had already contractually agreed to attend Brentwood Academy. The students and their parents had already selected Brentwood Academy, and therefore, there was no opportunity for solicitation, much less undue influence, as in Ohralik. Accordingly, Ohralik does not support the constitutionality of the ban involved here.

E.

Even if the Recruiting Rule ban were not content-based, it would still run afoul of the First Amendment for

another reason. By using the phrase "appropriate or normal" to define the already imprecise term "undue influence," the TSSAA retains unbridled discretion to penalize those expressing points of view with which it disagrees. Forsyth County, 112 S.Ct. at 2401-02.[26] Indeed, the TSSAA invoked these vague terms in finding Plaintiff in violation of the Recruiting Rule, but did not explain how the students involved were harmed. See Exhibit A to Complaint (Docket No. 1) ("This entire process [sending letters and calling those who had signed enrollment contracts] is seen as beyond what is normal and appropriate and is undue influence.")

The word "appropriate" is defined in Webster's Third New International Dictionary as "specially suitable." Webster's Third New International Dictionary 106 (1993). The word "normal" is defined as "according to, constituting, or not deviating from an established norm, rule, or principle." Id. at 1540. Neither of these definitions sheds any light on how to determine an "established norm," or to whom the conduct must be "specially suitable." Nor do they add any precision to the phrase "undue influence." Accordingly, the TSSAA is free to use the Recruiting Rule to arbitrarily suppress speech in violation of the First Amendment.[27]

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[26] That the TSSAA allows members to seek advice about how the Recruiting Rule will be interpreted does not eliminate the discretion it retains to apply those subjective terms in an arbitrary fashion.

[27] Because the Court has determined that the Recruiting Rule is unconstitutional by violating the First Amendment, it is unnecessary to address Plaintiff's argument that the Rule also violates its substantive due process rights under the Fourteenth Amendment because it is void for vagueness. The Court is persuaded, however, that the terms "appropriate," "normal," and "undue influence" would also be unconstitutionally vague for purposes of the Fourteenth Amendment. These terms have "no settled usage or tradition or interpretation in law." Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 2731,

115 L.Ed.2d 888 (1991). Consequently, the Rule fails to provide "fair warning" to those to whom it is directed, and is so imprecise as to present a real "danger" of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

The Rule prohibits the use of "undue influence," and that phrase, by its very nature, requires further explanation. The TSSAA defines the phrase "undue influence" by raising and answering five sets of questions and promulgating guidelines. It is unclear if the explanations expand the scope of the Rule, or if the Rule limits the expansive prohibitions that follow it.

In any event, the first question and answer used to define "undue influence" only makes matters worse. The TSSAA defines "undue influence" as "exceeding what is appropriate or normal." The phrase "appropriate or normal" could not be more vague. The words "appropriate" and "normal" are among the most relative terms in the English language. "Appropriate" or "normal" compared to what?

These profound defects could perhaps be ameliorated if "appropriate or normal" was clearly defined. However, nowhere in the Rule is the phrase "appropriate or normal" defined. Any yet, to further complicate matters, the TSSAA emphasizes the importance of the "appropriate or normal" standard by stating in its "Guidelines For Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence:'"

> The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of *many* things that can exceed what is normal and appropriate.

(emphasis added). Despite this statement, a major theme of the Recruiting Rule is vagueness.

The phrase "appropriate or normal" adds nothing to the definition of "undue influence," and is essentially meaningless. This vague Rule permits the TSSAA to engage in arbitrary and discriminatory enforcement precisely, the claim made by Brentwood Academy in this case.

In summary, the Court has determined that the Recruiting Rule violates the First Amendment on its face and as applied, and that Plaintiff is entitled to summary judgment as to Count I. Defendants are hereby enjoined from any use of the Recruiting Rule.[28]

Having found the Recruiting Rule unconstitutional, all sanctions imposed by the TSSAA on Brentwood Academy pursuant to the August 23, 1997 letter from the TSSAA to Brentwood Academy (Exhibit G to Complaint (Docket No. 1)) are void and unenforceable. The sanctions imposed are not itemized by type of violation. Therefore, to ensure that the First Amendment is not violated, all sanctions must be set aside.

VI. Fourteenth Amendment: Procedural Due Process

Plaintiff alleges, in Count III of its Complaint, that Defendants' actions have violated Plaintiff's Fourteenth Amendment rights to procedural due process. For purposes of its Motion for Partial Summary Judgment, Plaintiff argues two specific procedural due process rights which were allegedly violated by Defendants: (1) the right to a neutral, impartial and detached decision maker and (2) the right to confront and cross-examine adverse witnesses.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Thus, the Court must first determine whether Plaintiff has been

[28] Thus, the Court need not address whether the Recruiting Rule violates substantive due process standards because it permits a member school to be punished for the conduct of someone unconnected with the member school.

deprived of a property or liberty interest protected by the Constitution. Plaintiff asserts that it has property interests in both the fine assessed against it by Defendant and the contract rights to which it is entitled as a member of the TSSAA. Plaintiff further asserts that it has liberty interests in its reputation and opportunities for attracting students and raising funds for the school.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests property interests may take many forms." Id., 408 U.S. at 576, 92 S.Ct. at 2708. Property interests are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules of understandings that secure certain benefits and that support claims of entitlement to those benefits. Id., 408 U.S. at 577, 92 S.Ct. at 2709.

The Court finds that Plaintiff, at a minimum, has a property interest, in the $3,000 fine assessed against it by the TSSAA.[29] Accordingly, the Court need not address, at this time, Plaintiff's other asserted constitutionally-protected rights. Plaintiff was entitled to the constitutional protections of procedural due process in this case.

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[29] See,e.g., G&G Fire Sprinklers, Inc. v. Bradshaw, 136 F.3d 587 (9th Cir. 1998) (subcontractor had due process property interest in money withheld by state); Contractors Against Unfair Taxation Instituted on New Yorkers v. City of New York, 1994 WL 455553 (S.D. N.Y. Aug. 19, 1994) (property interest in money allegedly exacted for payment of fines for traffic violations); Jones v. Cowley, 1991 WL 252667 (10th Cir. Nov. 26, 1991) ("Certainly, there is no doubt that the $15 fine is a deprivation of a property interest."); Murray v. Dosal, 1998 WL 385915 (8th Cir. July 13, 1998) (inmate has property interest in money received from outside sources).

There are clear issues of fact, however, as to what process Plaintiff was given and whether that process was sufficient to meet the requirements of the Fourteenth Amendment. For example, there are genuine issues of material fact as to the extent of Defendant Carter's involvement and influence beyond the initial fact-finding investigation in this case. See, e.g., Plaintiff s Response to Defendants' Statement of Undisputed Facts (Docket No. 70), ¶ 9. There are genuine issues of material fact as to whether the second appeal, to the TSSAA Board of Control, was truly a de novo review. Id., ¶10. There are genuine issues of material fact as to whether bias or prejudgment played any part in the decision making process. Id., ¶¶ 9, 10, 15. There are genuine issues of material fact as to whether Plaintiff was given meaningful opportunities for confrontation and cross-examination of adverse witnesses. Id., ¶¶ 11, 12; Defendants' Local Rule Response (Docket No. 46), ¶¶ 51, 95, 98.

Accordingly, Plaintiff's Motion for Partial Summary Judgment, on the issue of procedural due process, is **DENIED**.

VII. Defendants' Motion for Summary Judgment

Also pending before the Court is Defendants' Motion for Summary Judgment (Docket No. 47), in which Defendants seek judgment on Plaintiff's federal and state law claims, with the exception of the antitrust claims.

Defendants contend that, because they are not "state actors," they are entitled to summary judgment on Plaintiff's constitutional claims. For the reasons stated above, the Court has found that Defendants are "state actors" and, therefore, Defendants' Motion for Summary Judgment on this issue is **DENIED**.

In addition, Defendants argue they are entitled to summary judgment on Plaintiff's state law claims. Those claims are set forth in Counts V and VI of Plaintiff's Complaint (Docket No. 1).

In Count V, Plaintiff alleges a cause of action for equitable estoppel. Defendants contend that none of the acts alleged by Plaintiff are sufficient to create an equitable estoppel under Tennessee law. What both parties overlook is the fact that there is no cause of action for equitable estoppel under Tennessee law. Val-Land Farms, Inc. v. Third Nat'l Bank in Knoxville, 937 F.2d 1110, 1115 (6th Cir. 1991). Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's purported claim of equitable estoppel (Count V) is **GRANTED**, and that claim is **DISMISSED**.

In Count VI, Plaintiff alleges a cause of action for "unfair, unreasonable, arbitrary and oppressive action" in violation of Plaintiff's rights under state law. Defendants contend that they are entitled to summary judgment on this claim because their actions with regard to Plaintiff were conducted in good faith and that the Court should not interfere with the internal affairs of a voluntary association. Whether Defendants' actions were unfair, unreasonable, arbitrary and oppressive or whether they were taken in good faith all raise genuine issues of material fact. See,e.g., Plaintiff's Response to Defendants' Statement of Undisputed Facts (Docket No. 70), ¶¶ 9, 10, 11, 12, 15. Whether TSSAA is a voluntary association is a disputed issue of fact. Id., 2, 4, 44. The parties clearly disagree as well about what actions were taken, what motivated those actions, and what resulted from those actions. Accordingly, Defendants' Motion for Summary Judgment with regard to Count VI is **DENIED**.

VIII. Conclusion

For the reasons described above, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is **GRANTED** in part and **DENIED** in part. Brentwood Academy's Motion is **GRANTED** as to its claim that TSSAA's Recruiting Rule violates the First Amendment on its face, and as applied to Brentwood Academy. Accordingly, Defendants are hereby enjoined from any use of the Recruiting Rule. All sanctions imposed by the TSSAA on Brentwood Academy pursuant to the August 27, 1997 letter from the TSSAA to Brentwood Academy (Docket No. 1, Ex. G) are void and unenforceable.

Defendants' Motion for Summary Judgment (Docket No. 47) is **GRANTED** in part and **DENIED** in part. Defendants' Motion is **GRANTED** as to Plaintiff's equitable estoppel claim and that claim is **DISMISSED**.

It is so **ORDERED**.

/s/
Todd J. Campbell
United States District Judge

No. 98-6113

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	**ORDER**
	)	
TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET AL.,	)	
	)	
Defendants/Appellants.	)	

BEFORE: Guy, Suhrheinrich and Gilman, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green, Clerk

[Filed October 29, 2001]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6113

Filed: December 3, 2001

BRENTWOOD ACADEMY,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET AL.,	)
	)
Defendants-Appellants.	)

MANDATE

Pursuant to the court's disposition that was filed 8/23/01, the mandate for this case hereby issues today.

A True Copy.

COSTS: NONE

Attest:

/s/ Yvonne Henderson
Deputy Clerk

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

BYLAWS

* * * *

Article II
Eligibility Rules

The member high schools of the Tennessee Secondary School Athletic Association have adopted, through their elected representatives, an essential inter-related group of minimum eligibility requirements which establish the threshold for participation for all students within the interscholastic program and which work together to define and preserve the fundamental nature of the program.

* * * *

Recruiting Rule

Section 21. The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting rule?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would reuslt in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be

referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high

schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.)

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines For Understanding The "Recruiting Rule" and Understanding "What Is Undue Influence?"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12-, 13-, 14-year-old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

* * * *

Special Cases Involving Hardship

Section 30. Except for the eligibility rules in regard to age and to the number of semesters in school, the Executive Director shall have authority to set aside the effect of any eligibility rule upon an individual student when in his opinion the rule fails to accomplish the purpose for which it is intended or when the rule works an undue hardship upon the student.

* * * *

No. 98-6113
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,

Plaintiff/Appellee,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,

Defendants/Appellants.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

BRIEF OF AMICI CURIAE CHESTER E. FINN, JR. AND DANIEL CASSE IN SUPPORT OF PLAINTIFF/APPELLEE BRENTWOOD ACADEMY'S PETITION FOR REHEARING *EN BANC* *

* *This brief was filed in support of Brentwood Academy's initial Petition for Rehearing En Banc but was not accepted for filing pursuant to Rule 29(e), Federal Rules of Appellate Procedure.*

We file this statement as individuals, on our own behalf. We are not lawyers but policy analysts long-interested in education matters, and particularly in issues relating to accountability of public education systems and officials and to access to quality educational opportunity for all students. The panel decision in this case has been brought to our attention, and we want to share with the full Court our perceptions and concerns about what we regard as an important case and what seems to have been a most cursory treatment of serious matters by the panel opinion.

We should identify ourselves, although we reiterate that we speak on our own behalf and not as representatives of any organization or group (although we do think of ourselves as speaking, as we often have, on behalf of the cause of education accountability, access and quality).

Chester E. Finn, Jr. is the President of the Thomas B. Fordham Foundation, which is officed in Washington D.C. and does much of its work in Dayton, Ohio. The Foundation supports research on national education issues, including accountability and access. It widely disseminates the results of this research to policymakers, civic leaders and influential educators. In the Dayton area, where the Foundation has historical roots, it supports education activities designed to boost school quality, accountability, parent information and choice, particularly for disadvantaged youngsters heretofore trapped in unsatisfactory schools. Dr. Finn holds the bachelors, masters and doctorate degrees from Harvard University and has devoted his career to educational policy issues.

Dr. Finn has been involved in public service ranging from serving as an aide to Daniel Patrick Moynihan when Mr. Moynihan was Ambassador to India and U.S. Senator to serving as Assistant Secretary of Education for Research and

Improvement under Education Secretary William Bennett, with whom Dr. Finn is currently co-authoring a book on education (a parents' guide). For many years, Dr. Finn was affiliated with Vanderbilt University and the Hudson Institute and is now affiliated with the Manhattan Institute. Dr. Finn was also a founding member of the Edison Project, headed by former Yale University President Benno Schmidt, which designed alternative models for schools. Dr. Finn has done research on and is an expert on charter schools. He is also in the final stages of a book on that topic.

Daniel Casse is a senior director of the White House Writers Group, a public policy and strategic planning group. Mr. Casse received the bachelor's degree from the University of Toronto and his masters in public administration degree from the Kennedy School of Government Harvard University. He has served in the White House as special assistant to President Bush for Cabinet Affairs. Previously he had worked for William Bennett at both the U. S. Department of Education and National Office of Drug Control Policy. A former managing editor of The Public Interest, a public policy quarterly, his writing on politics and public policy has appeared in The Wall Street Journal, Commentary, and Policy Review. During the 1996 presidential campaign, Mr. Casse was a senior policy advisor to candidates Lamar Alexander and, later, Bob Dole.

I. The Reason for Concern: What This Case Is Really About.

While we are not constitutional scholars, we are scholars and policy analysts with strong interests in the area of public school officials' accountability for, and young people's access to quality educational opportunity. We are concerned that the panel opinion in this case misperceived the importance of the issues raised and tended to view the

case – somewhat dismissively – as merely a high school sports case. As non-lawyers, we have great reverence for our judicial system, and indeed the sister of one of us is a judge herself. So we are quite sympathetic to what seems to be the panel's concern about the potential for heavy-handed judicial intervention in seemingly private matters of scant public consequence. In particular, we applaud the panel's general instinct that courts should not reach out to constitutionalize everyday behavior in the private realm. We concur that preserving a private realm beyond the scope of constitutional intrusion is an important value. Our concern is not with that principle underlying the panel's decision but with its application in the context of this case.

To state the point boldly, we think that the panel judged this book by its cover without peering very far inside to see what was written there. The symptoms are clear.

The very first paragraph of the panel's background discussion of the case is all about Brentwood Academy's athletic prowess. The panel self-evidently saw the case as one involving a "high school football powerhouse." The panel noted that the school's football team had been nationally ranked by USA Today, stated what the school's football record had been over the past 28 years, and noted that the school had won many statewide championships. The panel further noted that the school's "basketball team is also well known in athletic circles." (Slip Op. at 3). Near the end of the opinion, the panel noted the problems associated with the enforcement of the rule in question but placed emphasis on resolution of the dispute within the TSSAA rather than in federal court, indicating that the court should not play the role of "super referee[] over high school athletic programs." (Slip Op. at 14).

This emphasis on considerations of "arbitrary enforcement" of "vague" rules led the panel to view this as a case about "eligibility for competition" in sports and that, so viewed, the issues were "not of constitutional magnitude." Id. The panel treated this entirely as a dispute about the arbitrary application of some rules and refused to intervene in what it regarded an internecine dispute about a matter of little constitutional or policy import. But our understanding is that the case far transcends the particulars of the dispute at issue. The District Judge held the rule in question unconstitutional not only as it applied in this particular case but on its face as it would apply in any case. That is the aspect of the dispute that has gotten our attention, since we have no interest ourselves in entering into a dispute about allegedly arbitrary enforcement of a sports-eligibility rule.

But to view this case in that way is fundamentally to misperceive what is at stake. This is not just a case about arbitrariness in formulating or applying a rule regarding the eligibility of athletes. That would be like saying that Marbury v. Madison was just a case involving the question of whether a particular judge should get his commission. It is true as far as it goes, but it does not go very far in fact and does not get to the true significance of the case. Just as the bus desegregation cases did not just involve the question whether the seats in the front of the bus were superior in some way (more convenient?, more comfortable?) to the seats in the rear, this case does not only deal with athletic eligibility.

Rather, this is a case involving fundamental First Amendment freedoms, which in this case arise in an athletic context but which go to the heart of issues relating to access to quality education and school choice. Also, it is a case involving accountability of public school officials who seek to avoid this accountability by coming together in a

nominally private association that they run and whose very purpose is to exercise explicit or implicit authority delegated to it by the state (which in Tennessee as in every other state is obliged under state constitutions not only to pay for but actually to provide educational services to its citizens).

II. The Accountability Concern.

* * * *

III. The Concern About Access to Quality Education.

A particularly troubling aspect of the TSSAA regulation subject to challenge in this litigation is the attitude it expresses about the availability of educational opportunity for youngsters who might be attracted to a school such as Brentwood Academy. The District Court well-captured the appropriate role of government in situations such as this. It is not in preventing the flow of information to potential students or their families, even if, when informed, those students choose to leave public schools and opt for private. It is an abuse of the first amendment for TSSAA, governed exclusively by a group of public school principals, to restrict communication – the speaker's right to communicate information and the student's right to receive information – on the educational opportunities available. This is particularly true when, as here, what motivates the restriction on speech is the fear that the listener will indeed act on the basis of that information.

The District Court properly understood the state's interest as prohibiting coercion or fraud, not eliminating any information that could inform school choice. How are students and their families to learn about private school opportunities – and yes, financial aid opportunities as well – unless such information is broadly and freely available?

How can government or TSSAA, which operates under color of law, justify a freeze on targeted school-initiated communication with prospective students? As the District Court found, it cannot. We would welcome a targeted set of restrictions that would enhance choice and opportunity by eliminating pressure tactics and other encumbrances to choice. But a flat-out ban on targeted school-initiated communication is entirely inappropriate.

Further, the concern about students and their families learning about private school options is thoroughly at odds with the first amendment's guarantee that communication and information inform choice, but that choice regarding speaker and subject matter remains with the speaker and listener. And, consistent with the first amendment, government has no legitimate interest in stifling school choice by restricting the flow of helpful and truthful information. Government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships, even at the expense of the child's overall welfare. Maintaining a competitive balance in athletics just cannot be an appropriate or legitimate basis for suppressing speech and thereby restricting educational opportunity for students. The District Court saw this point, but it seems not to have reached through to the deliberations of the panel that decided the appeal in this case.

Extracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds. The opportunity to attend a private school such as Brentwood Academy, with its emphasis on college preparation and admission (one of its swimmers was admitted to Yale this year), cannot be realized unless potential students and their families have

access to information about curricular and financial-aid activities. If schools are interested in a youngster's talents – whether curricular or extracurricular – it is not the business of government to suppress speech so that a youngster is kept in the dark about educational choices that may be available to him or her. Surely, keeping a prospective varsity athlete in the dark to assure his or her playing for a public school athletic program is an insufficient basis for imposing a blackout on school-initiated targeted communications. The first amendment guards against that type of censorship (while allowing for regulation of coercive conduct).

In addition, extracurricular activities constitute an integral component of an overall education for most youngsters. The panel decision seemed to regard interscholastic athletics as entirely distinct from education. This is incorrect. Students learn in different ways, but one essential ingredient is motivation. While valuable in themselves for such lessons as leadership skills and physical well-being, extracurricular activities such as athletics are important as a way of motivating young people. Many athletes who stay in school or progress into a university setting may have been encouraged to study because of their interest in sports, but learning and the pursuit of knowledge can be infectious. Athletics can provide the exposure to ideas and the motivation to learn. They, like art, drama, and journalism, can serve as the hook to get the attention of students and rivet it on the core curricular mission of the schools.

The hostility to students' access to choices in selecting their secondary school is palpable in the regulation under challenge. And the particular method of resisting access to educational quality through choice – the suppression of speech – is peculiarly odious in a democratic society because it suggests that government somehow has a

right to expect students to attend (and play sports for) public schools. But children are not the property of the state, and government cannot stifle access to educational opportunity through censorship.

These are important national issues in education, and they far transcend the characterization of the issues as described in the panel opinion. As we understand it, these free speech claims could have been brought even in the absence of a specific episode, so the concern about judicial micromanagement of sports eligibility questions is not really the core question here. Accountability of public education officials, and access to information that allows informed educational choice and access to quality education are the critical issues in this litigation. We worry that the panel never got beyond the fact that Brentwood Academy is a football "powerhouse" to a consideration of just how significant the issues in this matter are to core educational values now being debated nationally. For these reasons, review of this matter by the Court *en banc* is highly desirable.

Respectfully submitted,

/s/
Chester E. Finn, Jr.

/s/
Daniel Casse

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved in this case, are the First and Fourteenth Amendments, as enforced by the federal civil rights statute, 42 U.S.C. §1983.

The relevant portion of the First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech.

The relevant portion of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property without due process of law.

The relevant portion of the civil rights law, 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Summary of Characteristics of the Recruiting Rule

It is helpful to provide a summary of the salient features of the Recruiting Rule. These features set up the background that demonstrates (a) that the rule is a content-based regulation, (b) that the regulatory regime provides excessive discretion, and (c) that the rule is a regulation of "pure speech" – communicative activity itself.

- The Recruiting Rule is a direct regulation of the fact of communication, on communicative activity itself, not on independent, unrelated separately identifiable conduct.

- The rule restricts the method or modality of communication (no school-initiated targeted contacts).

- The rule focuses on a particular subject matter (athletic purposes generally and financial aid in particular).

- The rule restricts who can speak on behalf of a school (restricting communication, in particular, by coaches).

- The rule is driven by a concern that students and parents who receive information will be influenced by it and will act upon it (i.e., on "primary" not "secondary" effects).

- The existence of a "feeder pattern" exception undermines the TSSAA's asserted interests and favors certain speakers and listeners and possibly certain messages.

- The "undue influence" standard provides "unduly broad discretion" to TSSAA as a regulatory body (as reflected in this case where, concededly, Petitioner had no intent to violate the rule) and the entirely standardless waiver provision presents a serious risk that the TSSAA's

Executive Director "will favor or disfavor speech based on its content." *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775 (2002)(slip op. at 7).

~~99-901~~
01-1117 (2)

No.

Supreme Court, U.S.
FILED
MAR 1 2002
CLERK

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION
AND RONNIE CARTER, EXECUTIVE DIRECTOR
AND INDIVIDUALLY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The opinion of the United States Court of Appeals for the Sixth Circuit, *Brentwood Academy v. TSSAA*, 262 F.3d 543 (6th Cir. 2001), accurately recites the pertinent facts and procedural history of this case. The Statement of the Case in the Petition for Writ of Certiorari filed by the Petitioner Brentwood Academy ["Brentwood Academy"] does not. Petition pp. 2-8. Consistent with its tactics at each step of the litigation process, Brentwood Academy continues to distort the nature and effect of the TSSAA recruiting rule and to ignore even the Rules of the Supreme Court.[1] Petitioners injection of legal argument in its Statement of the Case does not lend any further credence to its misrepresentations of fact.

Contrary to the unfounded assertions of Brentwood Academy, the TSSAA recruiting rule does not impose a ban on contact between a school and a prospective student athlete. Brentwood Academy's penchant for hyperbole[2] will not change the recruiting rule into something it is not. The recruiting rule in Article II, Section 21, of the TSSAA By-Laws provides:

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[1] Appendices E and G to Brentwood Academy's Petition should be disregarded entirely. Appendix E consists of nine (9) pages of pure lay opinion. Passed off as an "amicus brief," Appendix E was in fact rejected for filing by the Sixth Circuit, and permission to file it has not been sought in this Court. Appendix G is nothing more than a summary of some of Brentwood Academy's arguments. An appendix is not a vehicle by which a Petitioner may disguise what are in effect additional arguments that otherwise exceed the 30 page limitation for the Petition. U.S. S. Ct. Rules 14 and 33.

[2] See Petition at 5 (referring to the recruiting rule as a "flat ban") and 14 (characterizing the recruiting rule as erecting a "Berlin Wall" around students).

> "The use of undue influence on a student (with or without an athletic record) the parents or guardians of a student by any person connected or not connected with the school to secure or retain a student ***for athletic purposes*** shall be a violation of the recruiting rule." [emphasis added].

The recruiting rule clearly addresses athletics only. It prohibits only the use of undue influence to secure a student *for athletic purposes*. As the Sixth Circuit noted, even Brentwood Academy's attorney recognized in 1993 that there are any number of ways that a school can communicate with a prospective student, even about athletics, without running afoul of the recruiting rule. *Brentwood Academy*, 262 F.3d at 552. A form letter to all prospective students which gives general school information, including information about athletics, is a type of school-initiated communication that can be used without violating the recruiting rule. Brentwood Academy can provide all the information it wishes about athletics during visits to the school by prospective students. Brentwood Academy can place advertisements in visual, audio, and print media to convey information about its athletic program. As long as the school's purpose is not to secure a student "for athletic purposes," the recruiting rule does not limit Brentwood Academy's interactions with prospective students at all.[3]

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[3] Pointing to the interpretive guidelines that accompany the recruiting rule, Brentwood Academy argues that the guidelines "bar school-initiated, targeted 'contact' for any reason," Petition at 2, not just the use of undue influence for athletic purposes. This assertion elevates the guidelines to a higher level than the rule itself. The interpretive guidelines apply only to the recruiting rule, which in turn proscribes only the use of "undue influence,"

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The recruiting rule is accompanied by a lengthy series of "questions and answers" and "interpretive guidelines" which enable the reader to better determine what types of conduct may constitute "undue influence" to secure a student for athletic purposes. These guidelines also guide and constrain TSSAA in its enforcement of the recruiting rule. Since these "questions and answers" and "interpretive guidelines" undermine its overbreadth challenge to the recruiting rule, Brentwood Academy looks elsewhere for an excuse to assert that the TSSAA Executive Director somehow has "unbridled discretion" to use the rule to arbitrarily suppress speech. Petition at 5. Brentwood Academy bases this argument on what is commonly referred to as the TSSAA "hardship rule," which is *purportedly* reproduced in Brentwood Academy's Appendix at page 6-D.[4] However, the "hardship rule" has nothing whatsoever to do with this case. The "hardship rule," by its terms, allows the Executive Director in certain specified circumstances to "set aside the effect of any *eligibility* rule on any *student*...." The recruiting

Footnote 3 Continued

and then only where the influence is used to secure the student "for athletic purposes." Contrary to Brentwood Academy's self-serving attempt to enlarge the scope of the rule, the TSSAA recruiting rule is concerned only with athletics. TSSAA regulates interscholastic athletic competition among member schools and nothing more. *Cf. Owasso Ind. Sch. Dist. No. 101 v. Falvo,* ____U.S.____, 2002 WL 23253 (Feb. 19, 2002) ("[T]he words of a statute must be read in their context with a view to their place in the overall statutory scheme." slip. op. at 7, quoting *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989)).

[4] At page 6-D of the Appendix to its Petition, Brentwood Academy quotes only a portion of the "hardship rule," which it claims to create "unbridled discretion" in the TSSAA Executive Director to waive the rules. The remaining substantive portion of the "hard-

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rule is not an eligibility rule for students. It is a rule that limits the athletic recruiting conduct of schools.

The recruiting rule violations that gave rise to this action were three-fold. First, the head football coach and athletic director at Brentwood Academy provided free passes that were used by two star middle school football players to gain free admission to a Brentwood Academy football game. Second, the same head football coach sent a letter in the spring of 1997 to a dozen male eighth-grade students, all of whom were still enrolled at other schools, inviting those students to attend spring football practice at Brentwood Academy. Third, the head coach then telephoned each of these twelve students to reiterate the invitation he had made by letter.[5]

Footnote 4 Continued

ship rule," omitted by Brentwood Academy, actually provides the "bridle" that Brentwood Academy claims is absent:

> "The conditions causing the student to fail to meet the eligibility requirements must have been beyond the control of the school, the student and/or his or her parents, and such that none of them could have reasonably been expected to comply with the rule the violation of which is involved." Article II, Section 30, of the TSSAA By-Laws.

Setting aside the complete irrelevance of the "hardship rule," one can only speculate as to why Brentwood Academy chose to omit from the Appendix the latter portion of the rule .

[5] Brentwood Academy claims that it was "legal" for these students to participate in spring football practice, but "illegal" for the school to communicate about the practice with those students. This assertion is simply incorrect. As the Sixth Circuit recognized, there were numerous ways that Brentwood Academy could have notified prospective students about spring football practice. *Brentwood Academy,* 262 F.2d at 552. What it could not do, under the recruiting rule, is target prospective male athletes who were not yet enrolled at Brentwood Academy with personalized letters and phone calls from the head football coach.

Brentwood Academy's recruiting conduct had nothing to do with informing students of "educational opportunities" or with fostering "school choice." The conduct for which Brentwood Academy was found to be in violation of the recruiting rule clearly involved interactions with prospective athletes "for athletic purposes." Moreover, none of the violations were found based on any exercise of "unbridled discretion" by TSSAA. As the Sixth Circuit noted, Brentwood Academy's violations of the recruiting rule involved conduct expressly identified in the interpretive commentary that accompanies the rule. *Brentwood Academy*, 262 F.3d at 556.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

I. THIS CASE HAS NOTHING TO DO WITH "SCHOOL CHOICE."

Brentwood Academy attempts to transmute this case from a simple dispute about the agreed rules of a game into a forum on the politically charged issue of "school choice." Petitioner pretends to the role of school choice champion in order to curry political interest and invoke inapplicable First Amendment principles. School choice is, of course, an issue of national interest, but TSSAA's recruiting rule is not relevant to any aspect of the debate.

A. The Real Operation and Effect of the Recruiting Rule

Every student and parent in Tennessee has free and ready access to every bit of available information that Brentwood Academy chooses to disseminate about its educational, athletic, and spiritual programs. Among

other modes of communicating, Brentwood Academy can advertise in any medium, send mailings to any general populace of students, respond to student or parent inquiries, post flyers, or conduct presentations for a school's general student body. Every parent and student is absolutely free to choose Brentwood Academy for secondary school education.

The recruiting rule is designed, intended and applied to prevent one, and only one, form of inappropriate, exploitative and dangerous conduct -- soliciting and enticing child athletes because of their perceived athletic prowess. *Cf. Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding child labor laws against guardian's First Amendment challenge in order to deter exploitation of children).[6] Contrary to Brentwood Academy's bold assertion, "[T]here *is*...(a) core of easily identifiable and constitutionally proscribable conduct" addressed by the recruiting rule. *See Secretary of State v. Joseph H.*

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[6] *Prince* illustrates that even well-intentioned exploitations of children pose risks to the child that justify prophylactic statutes and rules. In 1996, Tito Lee graduated from Brentwood Academy as one of the top high school football players in Tennessee. Despite coming out of a "college preparatory" program, Lee did not meet academic requirements for college athletic eligibility. After an uneventful stint at a junior college, Lee lied to family and friends, telling them he was going to attend and play football at a nearby university. On August 3, 1998, the day he was to leave for school, Lee committed suicide. Another high school student with Tennessee connections, Amare Stoudemire, was the subject of a recent HBO television documentary about the pitfalls for minors created by athletic recruiting of secondary school athletes. Stoudemire has been recruited out of and into seven different high school basketball programs throughout the eastern regions of the United States. One "school" Stoudemire attended held "classes" in a single room basement, and its only "students" were the members of the basketball team.

Munson Co. Inc., 467 U.S. 947, 965-66 (1984). It is a "prophylactic measure whose objective is the prevention of harm before it occurs." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978). It focuses exclusively on the intent of adult recruiters who would otherwise allow their competitive zeal and desire for bragging rights to distort the proper role of athletic competition in secondary school education.[7]

Brentwood Academy mischaracterizes the recruiting rule by asserting that "the rule applies to athletes and non-athletes alike." Petition at 9. This false statement is apparently intended to thrust this case into the school choice debate. By definition, the recruiting rule applies only to student athletes or those perceived as such. The phraseology in the rule which Petitioner distorts is the prohibition of solicitation of a student athlete "with or without an athletic record." App. at 6-B. That language merely accounts for the everyday reality that not all athletically gifted junior high children have yet chosen to engage in *interscholastic* competition. The scope of the recruiting rule, therefore, is defined not by the student's prior athletic record, but by the wrongful motive of the recruiting school.

Brentwood Academy's assertion that the rule could somehow force an "independent school... to avoid interscholastic athletics or to ban students it recruits generally from interscholastic competition...," Petition at 9-10, is gross hyperbole. Brentwood Academy's own expe-

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[7] *See Crocker v. TSSAA*, 980 F.2d 382, 386-87 (6th Cir. 1992) (TSSAA is "entitled to enforce its athletic rules in order to deter students, parents and school officials from trying to turn high school athletics into an activity that overshadows or unduly interferes with academic life.")

rience of over thirty years under the recruiting rule illustrates the intellectual dishonesty of Petitioner's assertion. The recruiting rule has no effect whatsoever on school communications absent an intent to recruit the student *for athletic purposes*.

B. The Real Brentwood Academy.

Brentwood Academy shies away from any discussion of the real conduct for which it seeks constitutional protections. Brentwood Academy claims a First Amendment right to seduce eighth-grade athletes with the glamour of high profile football. Brentwood Academy's motive is not an altruistic desire to expand educational opportunities or to spread its purported beneficence to those who are less fortunate. Petitioner could *easily* accomplish those aims without targeted solicitation of child athletes from other public and private middle schools. Brentwood Academy wants the ability to pluck the best athletes from wherever it finds them. "School choice" is simply the guise of the moment for achieving that goal.[8]

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[8] While Brentwood Academy was represented by attorneys Lee Barfield and Tom Nebel in two separate appeals before TSSAA from the initial findings of Ronnie Carter, "free speech" was never mentioned. Only after Vanderbilt law professor James Blumstein was engaged to assist with litigation was the First Amendment argument concocted as a basis for asserting federal court jurisdiction (in addition to assertions of antitrust law violations). The "school choice" argument, like the "free speech" argument, is simply the latest artifice for perpetuating federal court litigation. Just like an over-zealous football coach, Brentwood Academy is doing whatever it takes to avoid a loss. This Court should not spend more time on what is, in reality, a disingenuous contrivance for litigation purposes. *See Ginzburg v. United States*, 383 U.S. 463, 470 (1966).

This Court has long recognized that "the circumstances of dissemination of material are...relevant to determining whether (the) social importance claimed for material (is) pretense or reality" and whether it is the true reason for dissemination "or a spurious claim for litigation purposes." *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). *See also Splawn v. California*, 431 U.S. 595, 598-99 (1977). "Educational alternatives" are no more than possible and unintended by-products of Brentwood Academy's real objective, to solicit minors for exploitation on the football field.[9]

Hoping to gain a competitive advantage in athletics over schools who could never recruit, Brentwood Academy, speaking as a poseur for school choice, makes the predictable assertion that "(m)aintaining a competitive balance in athletics is not a legitimate basis for suppressing speech and thereby restricting educational opportunities for students." Petition at 12. There are two fundamental flaws in this unsupported assertion by Petitioner. First, the recruiting rule does not suppress speech; it restricts the time and manner of athletic recruiting conduct. The recruiting rule has no effect on the availability of any educational opportunity.

Second, Petitioner's denigration of "maintaining a competitive balance" as a "legitimate" interest is contrary to the First Amendment teachings of this Court. The penultimate First Amendment "competitions" are American political campaigns, and this Court has protected the "level playing field" for elections by upholding

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[9] Sam Ginsberg could have made equally sincere claims that he was promoting reading skills among the children to whom he sold pornographic magazines in *Ginsberg v. New York*, 390 U.S. 629 (1968).

restrictions designed to limit the undue influence of size and bankroll in order to maintain competitive balance and fairness. *See, eg., Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (refusing to apply strict scrutiny to state campaign contribution limits); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curium*) (federal contribution limits); *Burson v. Freeman*, 504 U.S. 191 (1991) (upholding restrictions on voter solicitation conduct near voting polls). Surely, the regulation of high school athletics does not require a *higher* level of scrutiny than the limitations on the core expressive conduct of political contributions upheld in *Buckley* and *Shrink Missouri*. Whether the context be high school athletics, commerce, or politics, the government purpose in enforcing regulations to maintain a level playing field is not to ban any specific speech content but to promote fair competition.[10] All competitions, whether in the fields of athletics, commerce, or politics, involve rules. When a voluntary participant breaks the rules so as to gain unfair competitive advantage and endanger all participants, the rule breaker must expect consequences. *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (athletics); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (commerce); *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982) (politics).

As its final line of pretense in the school choice arena, Petitioner attempts to invoke the rights of the student

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[10] In this regard, the recruiting rule is analytically less disruptive of First Amendment rights than the limitations on voter solicitation upheld in *Burson* in order to protect against abuses in the electoral process. The recruiting rule only regulates the solicitation of minors in a largely public education system, and the recruiting rule does not limit or address core political speech.

athletes and families it wants to solicit. According to Brentwood Academy, the recruiting rule somehow abridges the liberty rights of students under *Meyer v. Nebraska*, 262 U.S. 390 (1923), and the decision-making rights of parents under *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), even though the recruiting rule does not in any way restrict or prohibit student attendance at any independent school (*Pierce*) nor student participation in any activity at an independent school (*Meyer*). The recruiting rule merely restricts the manner in which Petitioner can solicit students or thrust itself into the parent-child decision-making process.

No parent or student has claimed that the recruiting rule deprived them of any information about academics, athletics, or financial aid at Brentwood Academy. No parent or student has complained that they wanted *more* uninvited intrusions by Brentwood Academy in their family deliberations. No parent has stepped forward to ask for *more* direct solicitation of his or her child for athletic purposes.

The State has a substantial interest in the integrity of the family unit and shares with parents a responsibility to nurture and protect children. *Prince,* 321 U.S. at 165-66; *Pierce,* 268 U.S. at 535. State authority complements parental authority, and this Court has recognized "the special interest of the State" in encouraging minors to seek parental advice. *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 639 (1979). Indeed parents "are entitled to the support of laws designed" to assist the parent by protecting family integrity and supporting parent/child decision making. *Id.*

The recruiting rule actually serves to prevent unwanted intrusions into family affairs and reduces the

potential for conflict about school choice between a concerned parent and a child who may have been targeted by a recruiter. Under the recruiting rule, the *parent* decides to make the initial inquiry about athletic competition, not a *recruiter* whose paramount interest is to use the child's body to win more football games.

The issue of school choice is certainly a matter of substantial national interest. No doubt, more cases like *Zelman, et al. v. Simmons-Harris*, No. 00-1751, argued on February 20, 2002, will come before this Court to squarely frame the pertinent Constitutional issues for analysis and argument by interested and sincere advocates. This is not such a case. Brentwood Academy is not a sincere champion of any aspect of school choice. Brentwood Academy simply wants to recruit bigger, stronger and faster child athletes for its teams. TSSAA simply wants to enforce a recruiting rule that for decades has served the State's substantial interests. The issue of school choice should be reserved for cases that truly present the issue with interested and sincere advocates on both sides.

II. INTERMEDIATE SCRUTINY IS THE PROPER STANDARD OF REVIEW FOR PETITIONER'S FREE SPEECH CHALLENGE OF TSSAA'S RESTRICTIONS ON THE TARGETED SOLICITATION OF MINORS FOR ATHLETIC PURPOSES.

A. The Actual Ruling and Analysis of the Court of Appeals

The Court of Appeals held that intermediate scrutiny is the appropriate standard for a First Amendment free speech challenge to a voluntary association rule that restricts a member school's targeted solicitation of children for athletic purposes. The Sixth Circuit con-

cluded that TSSAA's recruiting rule allows parents and students to obtain, and Brentwood Academy to disseminate, all available information about the school's academic, athletic, and financial aid programs. According to the Sixth Circuit, the recruiting rule does not ban any information; it restricts the time and manner of specific conduct regardless of content.

Contrary to Petitioner's representation, the Court of Appeals did not invert the proper analytical process for determining whether the recruiting rule is a content-based regulation, nor did it "misperceive( ) this Court's 'secondary effects' cases." Petition at 15. Instead the Sixth Circuit correctly found that the recruiting rule was a content-neutral regulation of a category of *conduct* and that the rule allowed ample alternative channels for Brentwood Academy to communicate its message.

The Court of Appeals readily acknowledged the *general* principle "that the 'government may not regulate speech based on its substantive content or the message it conveys'." 262 F.3d at 551 (quoting *Rosenberger v. Rectors & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995)). Unlike Brentwood Academy, however, the Court of Appeals did not end its analysis with a reflexive assumption that the recruiting rule was a content-based restriction on protected speech. The court looked instead to the application of the rule and found it to be a content-neutral regulation of certain proscribable conduct. As this Court has noted, in the assessment of restrictions on solicitation activity, "the appropriate focus is on (the) conduct." *Ohralik*, 436 U.S. at 463.

The Sixth Circuit's focus on athletic recruiting as content-neutral conduct is plainly evident from the

court's reliance on *Watchtower Bible & Tract Soc'y of N.Y. Inc. v. Village of Stratton Ohio*, 240 F.3d 553, 560 (6th Cir. 2001), and the discussion therein of *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), *United States v. O'Brien*, 391 U.S. 367 (1968), and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). In *Clark* the Court applied intermediate scrutiny to uphold a ban on camping in certain national parks even though the specific camping at issue was core political expressive conduct in protest of the plight of the homeless. 468 U.S. at 288-99. In *O'Brien*, the Court upheld a conviction for burning a draft card, declaring that regardless of the intended political message of the act of protest, the government regulation of conduct passed muster under the same intermediate scrutiny that applies to time, place, and manner restrictions on speech. *Forsyth County* involved a prior restraint license and fee for authorization of public speaking, parades, and assemblies involving core political activity, which the Court addressed under intermediate scrutiny as a restriction on the time, place, and manner of expressive *conduct*. This Court invalidated the ordinance not under strict scrutiny, but because of excessive discretion in the licensing authority under the intermediate scrutiny standard.

Athletic recruiting by any high school is an act, an occurrence, an event. Regardless of the specific content of any recruiter's message, the simple conduct of athletic recruiting is a proscribable event, and "it has never been an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct (is) in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik*, 436 U.S. at 456 (quoting *Giboney v. Empire*

Storage & Ice Co., 336 U.S. 490, 502 (1949)). Aside from the question of whether Brentwood Academy's recruiting messages have content that might also be proscribable because of the targeting of vulnerable minors, the mere *occurrence* of recruiting may be regulated subject to intermediate scrutiny because State regulation is triggered by the event rather than the content of any speech during the event. Just as the government could prohibit camping on its property in *Clark* even though the act of camping carried a core political message, so too may TSSAA prohibit the act of solicitation of minors within the State's domains of secondary education and interscholastic athletics. Just as the government interest in the administration of the selective service system in *O'Brien* justified punishment of the act of burning a draft card, so too may TSSAA punish the act of recruiting because of the State's substantial interests in the effects of recruiting on children and the administration of the State's education policies. Just as the permits for political events and activities in *Forsyth* were reviewed under intermediate scrutiny for time, place and manner restrictions, so too must TSSAA's Recruiting Rule be viewed as a reasonable restriction on the time and manner of Brentwood Academy's solicitation of minors.

The Court of Appeals essentially did nothing more than apply the differential analysis of speech restrictions discussed in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Even assuming that there is some "content-based" element in restricting athletic recruiting, Petitioner's conduct is still proscribable because the so-called content basis of the restriction — athletic recruiting of minors — "consists entirely of the very reason the entire class of speech at issue is proscribable...." *R.A.V.*,

505 U.S. at 388.[11] In such cases, "no significant danger of idea or viewpoint discrimination exists." *Id.* TSSAA does not discriminate among different ideas within the narrowly defined field of 'recruiting minors for athletics.' All conduct within the parameters of the recruiting rule is proscribable regardless of any substantive differences in the messages or techniques employed by the solicitor. Consequently, the Sixth Circuit correctly held that the recruiting rule is a content-neutral restriction on conduct to be reviewed under intermediate scrutiny.

In *R.A.V.* this Court also acknowledged that some content defined classes of speech can be regulated *because* of the "secondary effects" of the speech:

> "Another valid reason for according differential treatment to even a content defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the... speech.' *Renton v. Playtine Theatres, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 929, 89 L.Ed.2d 29 (1986)."

R.A.V., 505 U.S. at 389 (emphasis in original). "A regulation that *serves purposes unrelated to the content* ...is

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[11] The Court has consistently rejected the argument that government restrictions on harmful conduct suddenly fall victim to strict scrutiny whenever the conduct involves an element of speech. *See eg. Ohralik*, 436 U.S. at 457 ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities,... corporate proxy statements,... the exchange of price and production information among competitors,... and employers' threats of retaliation for the labor activities of employees...") (citations omitted).

deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added).

The "secondary effects" of soliciting minors for the purpose of athletic recruiting are substantial. These "secondary effects" do not all depend on the specific content of any solicitation nor on whether the listener is or is not persuaded by the message. The simple act of direct solicitation of a minor intrudes on the integrity of the family and usurps the parent's role as the initial and primary conduit of information to the child for important life decisions. The State has a substantial interest in assisting parents in the nurturing of children.

Regardless of the content or ultimate persuasive effect, the simple act of recruiting minors solely for athletic purposes also undermines the State's policies and decisions regarding the proper role of interscholastic athletics in the overall, integrated scheme for secondary education. The mere occurrence of athletic recruiting distorts and elevates the importance of athletics in the State's mix for a balanced educational environment. *Crocker,* 980 F.2d at 386-87. The mere occurrence of recruiting undermines the State's efforts to inculcate fundamental societal values such as fair play, integrity, and respect for the rule of law. Fourteen year-old children do not need yet another reason to believe that unfair competition and rule-breaking are the keys to success. The decisions of the State of Tennessee regarding the proper role of athletics in the educational setting are entitled to substantial deference. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The State also has a substantial interest in avoiding

any undue risk of physical injury to all children. Some risk of injury is inherent in athletic competition, and there is no dispute that at any given time a particular school may, by coincidence, have some advantage over its competitors in terms of size, speed and strength. That risk, however, is a far cry from the risk posed by sending a normal high school team into battle against a team with a dangerously abnormal concentration of size and strength as the result of targeted solicitation of youth. The "primary effect" of successful recruiting of individual children ultimately produces the cumulative "secondary effect" of an unreasonable risk of injury to others through the abnormal and unfair concentration of size and strength on one high school team.

Brentwood Academy's recruiting conduct is inherently harmful regardless of the specific content of the message it uses to solicit minors. Under the principles of *Clark*, *O'Brien*, *Forsyth County* and *R.A.V.*, the Sixth Circuit correctly held that Brentwood Academy's First Amendment challenge of the Recruiting Rule only warranted, at most, intermediate scrutiny. Under *Kuhlmeier*, TSSAA's judgments and standards in furtherance of the use of interscholastic athletics as part of the State's education of children are entitled to substantial deference. "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273.[12]

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[12] The same facts which led this Court to conclude that TSSAA is a "state actor", *Brentwood Academy v. TSSAA*, 531 U.S. 288 (2001), also call for deference to TSSAA's rules and decisions as those of the state and local educators and school officials found to control TSSAA.

B. There is No *Per Se* Rule of Strict Scrutiny for "Content-Based" Restrictions.

The fundamental flaw that tarnishes every argument of Brentwood Academy is its dogmatic assertion that any restriction of conduct regarding specific subject matter is automatically deemed to be a "content-based" ban that must be subjected to strict scrutiny regardless of any other factors or circumstances. It is this "content-based" podium from which Petitioner invokes inapposite First Amendment precedents and from which Petitioner denounces or simply ignores principles and precedent that are directly applicable to this case.

Some of the opinions of this Court appear to have declared a rule of strict scrutiny for any restriction that is in any way based on the subject matter of a message. *See eg. Police Dept. of Chicago v. Mosely*, 408 U.S. 492, 499 (1972); *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). However, the category of speech has frequently led the Court to make content-based distinctions as to the proscribability of certain speech and the standard of review for government restrictions. *See, eg. R.A.V. v. St. Paul*, 505 U.S. 377, 420-22 (Stevens, J., concurring) (partial cataloguing of examples of *content-based* regulations that have been upheld for zoning restrictions, broadcasts of specific words, commercial versus political advertising, partisan speech by state employees, misleading advertising and trade practices, employer speech in labor matters, advertising of cigarettes but not cigars, solicitation by lawyers but not doctors). The distinction between protected speech and the defined categories of "non-speech" such as obscenity, fighting words and defamation, is also necessarily content-based, and in some instances the same content is subjected to

different levels of scrutiny depending on the nature of the speaker, or the audience, or the forum.

C. The Pertinent Factors that Petitioner Ignores.

Brentwood Academy does not discuss those aspects of its expressive conduct which this Court has often cited as independently sufficient reasons for lowering the level of First Amendment scrutiny such as an audience of minors, deference to State policymaking for education, government "property," commercial solicitation, targeted solicitation, protection of family integrity, risk of undue influence, fair competition, and pretextual constitutional claims. These factors have each been found by this Court to justify a lower level of scrutiny for restrictions on speech. The confluence of *all* these factors for Brentwood Academy's conduct suggests that TSSAA's proscription of Brentwood Academy's solicitation of minors warrants intermediate scrutiny at most. Brentwood Academy, however, asks for this Court's time and resources to present a demand for strict scrutiny review without even acknowledging the special nature and circumstances of its own conduct.

1. Voluntary Membership and the Voluntary Contract for Agreed Rules

Year after year for 30 years Brentwood Academy voluntarily renewed its contract to have TSSAA regulate the sports in which the school participated in exchange for Petitioner's voluntary promise to comply with all TSSAA rules, including the recruiting rule. No state law or regulation requires TSSAA membership, and some Tennessee schools elect not to join. As was true of the University of Nevada Las Vegas in *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988), Brentwood Acad-

emy "could have voluntarily withdrawn from the Association" at any time it chose and then engaged in whatever recruiting activity it desired. The only consequence would have been that Brentwood Academy could not have competed in the post-season tournaments sponsored by TSSAA. Instead, Petitioner voluntarily joined the TSSAA "team," accepted all the benefits of TSSAA membership, and agreed to the programmatic policies of TSSAA.[13]

By voluntarily agreeing to TSSAA rules in order to reap the benefits of TSSAA membership, Petitioner chose the benefit rather than the unfettered right to solicit minors.[14] In this respect Brentwood Academy is in no different position than the student athletes who join a football team and agree to comply not only with the rules of the game but also the team rules and the school rules. "By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 657

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[13] The government may in some circumstances constitutionally limit access to a government benefit on a basis that restricts freedom of speech. *Regan v. Taxation Without Representation of Washington*, 461 U.S. 540 (1983) (denying tax exempt status for charitable donation where the charitable organization conducts lobbying activities, does not violate the First Amendment); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) (no violation of rights in state denial of unemployment compensation to workers who lose jobs as a result of a labor dispute).

[14] *See*, *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991); *Grove CityCollege v. Bell*, 465 U.S. 555, 575 (1984): *Legal Aide Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017, 1028 (9th Cir. 1998) ("By choosing to accept the government benefit, a recipient voluntarily consents to any restrictions placed on the receipt of the benefit").

(1995) (upholding random urinalysis requirement for participation in interscholastic athletics). The Court in *Vernonia* further emphasized the pivotal importance of a complainant's voluntary decision to agree to common rules: "Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights...." *Id.* (citations omitted).

2. An Audience of Minors in the Setting of Secondary School Education.

Brentwood Academy stands curiously silent on the constitutional significance of the fact that its speech and conduct are directed to an audience of minor school children. By implicitly suggesting that the recruiting rule should be evaluated on the basis of First Amendment standards for adults, with a blind eye to the special constitutional standards for children, Brentwood Academy asks this Court to follow its lead into fundamental analytical error. As noted in *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979):

> The Court long has recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: "[C]hildren have a very special place in life which law should reflect. *Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty towards children.*"

Id. (emphasis added) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring opinion)).

Although minors certainly enjoy rights under the First Amendment, *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 506 (1969), this Court has made abundantly clear that the State is allowed considerably more power and discretion in regulating speech and conduct involving children. *See, e.g. Ginsberg v. New York*, 390 U.S. 629 (1968) (conviction for sale of non-obscene material to minors); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (regulation of radio broadcasts reaching minors); *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675 (1986) (content-based disciplinary actions for lewd speech); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (censorship of core speech in student newspaper when the censorship was "reasonably related" to "legitimate pedagogical concerns."). The special protections for children extend even further when the exploitation of minors might be curtailed. *Compare Stanley v. Georgia*, 394 U.S. 557 (1969) (First Amendment right to possess even obscene materials), *with Osborne v. Ohio*, 495 U.S. 103 (1990) (No First Amendment right to possess child pornography).

In virtually every case involving an audience of minors, this Court has looked at the content of the restricted speech, the "nuances of presentation and the context of its dissemination," *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (Brennan, J., dissenting), as well as the State's legitimate interest in regulating the specific conduct, subject area and content of the speech. Thus, for example, rather than "uncritically transfer(ing)" the "legal theories and their phrasing," from *Cohen v. California*, 403 U.S. 15, 18 (1971), to a case involving minors, as Brentwood Academy suggests, Petition at 30, this Court has looked beyond the black letter rules for adults to the special circumstances

and considerations for children in each case. No doubt this kind of discriminating analysis is why "[t]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Bethel Sch. Dist. 403*, 478 U.S. at 682-83 (quoting *Thomas v. Board of Education, Granville Central School Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

Moreover, states are traditionally shown great deference by the courts on matters of educational policy and the choice of methods for teaching societal values. *Bethel School District* (punishment for slightly lewd speech); *Hazelwood School District* (censorship of student newspaper); *Vernonia School District* (compulsory urinalysis); *New Jersey v. TLO*, 469 U.S. 325 (1985) (warrantless search of purse); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment). The State and TSSAA should be allowed reasonable powers to restrict activities that undermine State policies, methods and goals for education.

3. The Solicitation Issues.

The conduct for which Brentwood Academy claims the ultimate protections of the First Amendment is the targeted solicitation of minors for either commercial gain, or even less worthy of protection, the ego gratification of adults. This simple fact immediately renders irrelevant every "solicitation" precedent cited by Brentwood Academy.

Only the "charitable solicitation" cases and some "associational solicitation" cases offer any hope of strict scrutiny review of restrictions on solicitation conduct. Consequently, Petitioner cites only those cases. *See*

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) (solicitation for charity); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (solicitation for charity); *Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (solicitation for charity); *In re: Primus*, 436 U.S. 412 (1978) (political association solicitation); *NAACP v. Button*, 371 U.S. 415 (1963) (same). Brentwood Academy does not solicit for charity, but for the physical talents of athletically gifted minors. More importantly, the primary reason for strict scrutiny in *Riley*, *Munson*, *Schaumberg* and the other charitable solicitation cases was the government's prior restraint requirement of a license or permit — a factor not presented by the TSSAA recruiting rule.

The recruiting rule also cannot be equated with the prior restraints on the core political activity of union organizing in *Thomas v. Collins*, 323 U.S. 516 (1945), nor the violation of First Amendment associational rights in *In Re: Primus* and *NAACP v. Button*. Brentwood Academy's claim invokes no prior restraint licensing requirement, no core political speech, and no infringement of the First Amendment right of association.

The cases that directly apply in this case are the commercial solicitation cases. Any speech affected by the recruiting rule is commercial speech. The purpose of recruiting is to secure attendance in order to generate tuition and athletic department revenues. When Brentwood Academy recruits a targeted student athlete, it is proposing a commercial transaction. The "solicitation" of young athletes by Brentwood Academy is every bit as commercial as was the solicitation of clients by lawyers in *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978), and *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995). In fact, Brentwood Academy's athletic re-

cruiting is analytically indistinguishable from the proscribable solicitation conduct of lawyers.

In both lawyer solicitation and high school athletic recruiting the client or athlete is solicited in person (*Ohralik*) or by targeted direct mail (*Went for It*) "for pecuniary gain in circumstances likely to pose dangers that the State has a right to prevent." *Ohralik*, 436 U.S. at 449. In both situations "the State bears a special responsibility for maintaining standards among the licensed professions."[15] 436 U.S. at 460. In both settings "the substantive evils of solicitation" include the potential "of overreaching and the exertion of *undue influence*"[16] and the need "to protect the privacy of individuals." 436 U.S. at 461. In both situations the soliciting party may claim that they are "communicating information" about opportunities such as legal rights or educational alternatives (which they could easily communicate without targeted solicitation), but in each case the recruiter/solicitor is "using the information as bait with which to obtain an agreement." 436 U.S. at 458. In both situations "the aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage...uninformed decision-making...." 436 U.S. at 457. In both cases the circumstances of the target "not

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[15] As part of its comprehensive and integrated program for education, Tennessee requires licensure of education "professionals" and educational institutions such as Brentwood Academy.

[16] Throughout this litigation Petitioner has challenged the alleged vagueness of the term "undue influence" in the recruiting rule. This Court, however, has found the term "undue influence" particularly apt for describing the proscribable conduct of one with superior knowledge, experience and persuasive powers engaging in direct solicitation of another who is in a position of relative vulnerability. *Ohralik*, 436 U.S. at 461-62.

only makes him more vulnerable to influence but also may make advice all the more intrusive." 436 U.S. at 465. In both settings "in-person solicitation is not visible or otherwise open to public scrutiny," and unless the State can impose "what in effect, is a prophylactic rule" to prevent harm before it occurs, "in-person solicitation would be virtually immune to effective oversight." 436 U.S. at 466.

In Tennessee vulnerable legal clients are protected from the dangers of targeted solicitation by Disciplinary Rules 2-102, 2-103, and 2-104. Vulnerable children who are blessed with athletic skills are protected from the dangers of uninvited targeted solicitation by the TSSAA recruiting rule.[17] TSSAA's restriction of Brentwood Academy's commercial speech and the proscribable conduct of athletic recruiting should only be subjected to intermediate scrutiny under the First Amendment.

III. THE RECORD IS NOT RIPE FOR REVIEW OF THE ISSUES RAISED BY BRENTWOOD ACADEMY.

Brentwood Academy's request for review is premature. "It is not the usual judicial practice (nor does the Court) consider it generally desirable, to proceed to an overbreadth issue unnecessarily - that is, before it is

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[17] In several cases this Court has drawn a sharp distinction between targeted solicitation, such as Petitioner's recruiting activity, and untargeted, broad-market solicitation such as advertising, which is permissible under the recruiting rule. *Compare Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (invalidating prohibition of general advertising by lawyers) *with Went for It*, 515 U.S. 618 (upholding prohibition of targeted direct mail solicitation by lawyers) *and Ohralik*, 436 U.S. 447 (1978) (upholding prohibition of in-person solicitation by lawyers).

determined that the statute would be valid as applied." *Bd. of Trustees State University of New York v. Fox*, 492 U.S. 469, 485 (1989). This is because of the Court's "reluctance to strike down a statute on its face where there (are) a substantial number of situations to which it might be validly applied." *Parker v. Levy*, 417 U.S. 733, 760 (1974).

Brentwood Academy, however, again relies on inapplicable precedents to try to gain the time of this Court. The cases cited by Brentwood Academy involve prior restraints in the form of pre-speech licensing requirements combined with elements of excessive administrative discretion. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992); *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Thornhill v. Alabama*, 310 U.S. 88 (1940). This Court has emphasized the historical abhorrence of prior restraint licensing, *Thomas v. Chicago Park Dist.*, ____ U.S. ____, 122 S.Ct. 775, 778-79 (2002), and cases involving prior restraint licensing have typically received the harshest treatment by the courts. In the absence of "unbridled discretion" and prior restraints, this Court has consistently required adjudication of "as applied" challenges before reaching a facial challenge.

As previously discussed, Brentwood Academy's claim of "unbridled discretion" does not withstand scrutiny. The recruiting rule is accompanied by guidelines and other materials which guide and constrain TSSAA's exercise of discretion. The "hardship rule", on which the claim of "unbridled discretion" is based, has been misrepresented by Brentwood Academy as to both the relevance and the terms of the rule. That rule, which has nothing to do with recruiting conduct, includes provisions omitted by Brentwood Academy from its Appen-

dix, provisions which provide the "bridle" Brentwood Academy claims is missing. Finally the term "undue influence," a term this Court found acceptably definite in *Ohralik*, is no less definite here. The fact that a rule leaves some matters subject to interpretation by those responsible for enforcement does not equate to "unbridled" discretion. If Brentwood Academy's concept of "unbridled" discretion were accepted, virtually every law or rule would be constitutionally suspect.

Nor is there any apparent danger that the alleged overbreadth will "chill" the speech of others while the "as applied" challenges are resolved in the District Court. The recruiting rule and the interpretive guidelines clearly identify the conduct proscribed, *Roth v. United States*, 354 U.S. 476 (1957), and the Court of Appeals correctly noted that Brentwood Academy's violations fell squarely within specific examples of proscribed conduct set forth in the rule's interpretive guidelines. 262 F.3d at 556. Moreover, because the proscribed recruiting is actually the commercial solicitation of minors, the overbreadth doctrine does not even apply in this case. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

Brentwood Academy's final assertion is that the recruiting rule is somehow a restriction on "pure speech" subject to facial challenge under the the "novel and narrow" question addressed by the Court in *Bartnicki v. Vopper*, ____U.S. ____, 121 S. Ct. 1753, 1757 (2001). *Bartnicki* did not announce a new or developing doctrine for "pure speech." The very narrow holding of the Court was that a newspaper could not be held liable under 18 U.S.C. § 2511(c) for publishing the contents of a conversation obtained through an illegal wiretap performed not by the newspaper but by an unidentified

source. *Bartnicki* is irrelevant. Brentwood Academy's argument about "pure speech" and a *per se* prohibition of communication has been squarely considered and rejected by this Court in the context of government restrictions on solicitation conduct. *Ohralik*, 436 U.S. at 462-67.

This case has not progressed in the trial court beyond cross-motions for summary judgment based on legal arguments. The Court should not devote attention to the merits of the case without a record that is ripe for review.

CONCLUSION

Brentwood Academy grasps at every First Amendment theory imaginable, hoping that at least one can be perverted to suit the school's needs. This case is not, and has never been, about free speech or school choice. It is about an over-zealous football coach who was caught engaging in recruiting conduct clearly prohibited by TSSAA rules. It is a case that has been elevated to the absurd by creative lawyers and a well-heeled private school. Of the thousands of Petitions before this Court each year, this is certainly not one of those few worthy of the Court's time. Brentwood Academy's Petition should be denied.

Respectfully submitted,

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No. 01-1117

IN THE
Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Once one gets by the "attitude" that characterizes respondents' Brief in Opposition (BIO), one quickly comes to the realization that this matter is all the more certworthy. The (unintended) consequence of the BIO, "attitude" and all, is a reaffirmation of the certworthiness of this matter and a thorough demonstration of additional reasons why this Court should agree to hear the far-reaching First Amendment issues raised by this case at this stage.

1. The Content-Based Regulation Issue and the Appropriate Standard of Scrutiny. Respondents concede that school-initiated targeted communication is proscribed under the recruiting rule "for athletic purposes." This concession[1] reinforces petitioner's claim that speech is circumscribed based on content (*i.e.*, the subject matter of the expression). *Cf. Burson v. Freeman*, 504 U.S. 191, 197 (1992)(stating that campaign-free zone around polling places was content-based regulation of expression because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign"). The court of appeals' contrary finding is, as respondents' submission now demonstrates, in considerable tension with (and, arguably, in direct conflict with) the Eighth Circuit's approach in *Republican Party v. Kelly*, 247 F.3d 854, 863 (8th Cir. 2001), *cert. granted*, 122 S. Ct. 643 (2001)(No. 01-521)(oral argument set for 3-26-02)(holding limit on judicial campaign speech content-based because it "depend[s] entirely on the subject matter of the speech"). In *Kelly*, which is pending in this Court, the court of appeals applied strict scrutiny to an analogous speech restriction; no

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[1] The district court found the prohibition on speech, based on the interpretive guidelines, to be much broader: "[A]ny school representative ... is prohibited from making an 'initial contact' with prospective student-athletes outside the 'feeder' pattern for any reason until the student is enrolled at the school." App. at 40-B. *Cf.* BIO at 2 n.3.

party has challenged the applicability of strict scrutiny in that case.

The application of intermediate scrutiny by the court of appeals in this matter is substantial error and worthy of review by this Court because content-based regulations are subject to strict scrutiny. *Hill v. Colorado*, 120 S. Ct. 2480, 2500 (2000) (Souter, J., concurring)(noting that "the government is held to a very exacting and rarely satisfied standard when it disfavors the discussion of particular subjects"). Respondents challenge that fundamental First Amendment precept. BIO at 19-20. This case presents an excellent vehicle for clarifying the nature, scope, and analysis of content-based regulation of speech. If allowed to stand, the case could undermine any approach to speech restriction adopted by this Court in *Kelly* since the *Kelly* case has been litigated on the assumption that strict scrutiny is the appropriate standard.[2]

2. The Secondary Effects Analysis. From the outset, respondents' concern in promulgating and enforcing the speech-restrictive components of the recruiting rule has been the fear that students will learn about athletic and academic opportunities that they might find attractive and that those students might act upon that information by choosing a non-public school option (a protected liberty under *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). The district court concluded that the rule's ban on expression "has the effect of preventing any influence on a student, not just 'undue' influence." App. at 48-B (emphasis in original).

The court of appeals held that the rule's ban on speech was not aimed at this "primary" effect but on a gossamer "secondary" effect, which was not identified or

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[2] The ban on speech in this case extends beyond that in *Kelly* in that the ban in *Kelly* does not apply to entities for which the candidate is not responsible, whereas in this case the school is liable for the speech of parties over which it has no control.

defined. It reasoned that the recruiting rule was a content-neutral regulation because it "does not completely ban all communications between coaches and prospective students." App. at 15-A. The existence of alternative modes of communication led to the conclusion that the rule was aimed at "secondary" effects.

But, as the Petition showed (pp. 15-18; 21-25), such an application of the "secondary" effects analysis is fundamentally flawed and at odds with this Court's treatment of the "secondary" effects concept. So, in their response, respondents have sought to develop a new theory in support of the court of appeals' "secondary" effects analysis.

Respondents now contend that the recruiting rule restricts "specific conduct regardless of content." (p.13). Putting to one side the obvious tension between this stance and respondents' position that the rule only applies to speech "for athletic purposes," respondents understand the need, under the "secondary" effects doctrine, to define "proscribable conduct" independent of and unrelated to the suppression of expression. *Id.* at 13-14. This recognition by the respondents further undermines the position of the court of appeals, which identified no such independently "proscribable conduct."

The "proscribable conduct" identified by respondents is the "content-neutral conduct" of "athletic recruiting." *Id.* Respondents describe "athletic recruiting" as "an act, an occurrence, an event." For respondents, "the simple conduct of athletic recruiting is a proscribable event," and that is true "[r]egardless of the specific content of any recruiter's message." *Id.* at 14. The broad, even breathtaking, stance of respondents is clear from their view that "the mere *occurrence* of recruiting may be regulated subject to intermediate scrutiny because State regulation is triggered by the event rather than the content of any speech during the event." *Id.* at 15 (emphasis in original). For respondents,

"[a]ll conduct within the parameters of the recruiting rule is proscribable regardless of any substantive differences in the messages or techniques employed by the solicitor." *Id.* at 16.

Respondents' view treats "speech" as just another form of proscribable "conduct." But the First Amendment's protection of speech refutes that idea. Speech is not just another form of proscribable "conduct." Further, the suppression of speech, under this rationale, is directly related to the underlying regulatory objective – the prohibition of athletic recruiting. School-initiated targeted speech aimed at informing students about educational opportunities that include opportunities in the field of athletics is prohibited because such a ban is part of an overall strategy of barring athletic recruiting. As applied to such speech, the apparent concern is with the impact of that speech on the listener – *i.e.*, its "primary" effect. Speech unrelated to "athletic purposes" is, according to respondents, permitted, so it is not just speech, but speech about certain matters, that is barred. That is a ban on "primary" not "secondary" effects.

The district court found that the ban was not content-neutral because it "was purportedly enacted to prevent student-athletes from being subjected to the content of the message being conveyed by ... school representatives outside the student's feeder pattern." App. at 43-B. Respondents do not "have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade students that the educational experience at the school is superior to that to be gained at another school." That is, "it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses." Thus, "[i]n the competition among schools for students, the First Amendment prohibits the State from favoring one side of the debate by suppressing

the speech of the other... The TSSAA cannot control school choice through censorship." *Id.* at 45-46-B.

Moreover, respondents do not really define what underlies a ban on "athletic recruiting," at least as it relates to First-Amendment-protected speech. The recruiting rule prohibits use of "undue influence" in securing or retaining a student "for athletic purposes." With respect to non-speech-related conduct, petitioner has always supported restrictions on conduct such as remuneration or other similar inducements for enrollment. Those issues are not before the Court in this matter.

With respect to speech-related activity, the district court concluded that respondents have a "substantial interest in preventing a student from being threatened, coerced, or harassed." *Id.* at 45-B. But TSSAA has never presented evidence that the recruiting rule ban was enacted because "student-athletes were being harmed as a result of initial contact by school representatives, including the school's coaching staff." *Id.* at 46-B.

As respondents now concede, apparently, "undue influence" in the context of school-initiated targeted speech means "any" influence triggered by First-Amendment-protected expression. Students and their parents are barred from receiving school-initiated targeted communications, "regardless of ... the messages or techniques employed by the solicitor." BIO at 16. Thus, any claim to restriction on speech because of coercion or overreaching is eschewed. Expression aimed at informing students about educational opportunities is banned if it seeks to influence a family's school-choice decision because of "athletic purposes."[3]

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[3] Respondents' contention that "athletic purposes" is defined by the intent of the speaker raises serious chilling effect issues, since much permitted speech could be deterred because of concern about its

Such a regulatory regime, which bans a category of speech because the speech itself contributes to the "proscribable conduct" the state seeks to regulate, extends the "secondary" effects doctrine well beyond its current parameters. *See* Petition at 23-24 (discussing *Boos v. Barry*, 485 U.S. 312 (1988)).

3. The Excessive Discretion Issue. The Petition describes two types of discretion that raise substantial First Amendment concerns. The BIO confirms petitioner's stance on this issue.

(a) The imprecision of the "undue influence" and "appropriate or normal" standard, especially as it relates to protected speech, leaves "unbridled discretion" in the TSSAA as the regulatory enforcement authority, as the district court held. App. at 54-57-B. This subjects the recruitment rule to a facial challenge. *See* Petition at 26-29.

The interpretive commentary establishes some categories of *per se* illegality but does not supersede the underlying "undue influence" standard. The court of appeals acknowledged that "the recruiting rule by itself is certainly subject to challenge," but concluded that the "interpretive commentary" saves it from facial challenge on grounds of excessive discretion. App. at 22-A. Respondents seem now to concede, however, that the underlying rule itself controls and that the interpretive guidelines should not be "elevate[d] ... to a higher level than the rule itself." BIO at 2 n.3. This reaffirms petitioner's position, further undermining the court of appeals' position on the discretion issue.

(b) The discretion accorded to respondent Carter to waive the recruiting rule is unbridled and therefore subjects the rule to a facial challenge. Petition at 5; App. at 6-D. The Petition focused on the portion of the waiver provision that

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permissibility based on a school's state of mind and the harassment that could ensue from a hostile enforcement authority.

allows the Executive Director of TSSAA to waive the recruiting rule "when in his opinion the rule fails to accomplish [its] purpose." The waiver rule, which is written in the disjunctive on this point, also provides for waiver in cases of "undue hardship." These two grounds for waiver are separate and distinct.

Respondents contend that the Executive Director's discretion is "bridled" by the next sentence, which requires that the "conditions causing the student to fail to meet the eligibility requirements must have been beyond the control of the school, the student and/or his or her parents." BIO at 3 and n.4. The qualifying language applies to the "undue hardship" situation but self-evidently has no application to situations when, in the Executive Director's opinion, "the rule fails to accomplish the purpose for which it is intended." App. at 6-D.

Even in the "undue hardship" situation, the qualifying language still does not cabin the Executive Director's discretion. The recruiting rule applies to persons "not connected" to a school, App. at 1-D, and therefore to conduct "beyond the control of the school." From the universe of those events, the Executive Director has uncabined discretion in determining which such acts (of speech in this case) will be enforced and which ones will be waived as they affect prospective students.

Respondents assert that "none of the violations" in this case were based on an exercise of "unbridled discretion" by TSSAA. BIO at 5. But the existence of excessive discretion allows for a facial challenge, not just a challenge of a particular application of the rule. Proof of an "abuse of power in the particular case" is not required to make out a facial challenge. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Thus, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator

has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992).

4. The "Audience of Minors" Issue. TSSAA purports to defend the speech-restrictive elements of the recruiting rule by asserting that the rule is "directed to an audience of minor school children." BIO at 22. The recruiting rule cannot be defended on this ground since it prohibits school-initiated targeted speech directed at either students or their parents (or guardians). App. at 1-D. The rule cannot be justified on this basis since that is not the basis upon which it has been enacted or enforced. The rule, therefore, is of more generalized application and significance, and its purported justification more akin to that in *Republican Party v. Kelly*, 247 F.3d 854 (8th Cir. 2001), *cert. granted*, 122 S. Ct. 643 (2001).

5. The Anti-Solicitation Issue. The court of appeals failed to consider the First Amendment protection given to solicitation. The recruiting rule is an anti-solicitation restriction on school-initiated targeted expression. The solicitation and charitable solicitation cases demonstrate that strict scrutiny applies in such situations. *In re Primus*, 436 U.S. 412, 432 (1978); *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988). As it also did in *Watchtower Bible & Tract Soc'y v. Stratton*, 240 F.3d 553 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 392 (2001), the Sixth Circuit failed to take into consideration the First-Amendment-protected status of expression through the medium of solicitation, even while recognizing that the speech proscribed by the recruiting rule is non-commercial speech.

Strikingly, respondents do not really defend the court of appeals' analysis. Instead, they rely on solicitation cases involving commercial speech to defend the standard that the

court of appeals applied to non-commercial speech. The court of appeals, however, properly rejected respondents' position that the speech was commercial speech. The recruiting rule clearly applies to non-commercial exchanges (such as the two communications in the as-applied component of this case, which involved informational communications about spring football practice to students who had already agreed to matriculate the next fall and had signed contracts to that effect).

6. The Competitive Equity Issue. TSSAA argues that it can promote a level competitive playing field not only by prohibiting athletic recruiting conduct (such as use of financial blandishments) – a ban petitioner has always supported – but also by suppressing or censoring speech. This commodifies students, subordinating their choice of educational opportunities to the interests of public schools, their coaches and boosters in winning sports championships. This makes these athletically gifted students, who might well believe that athletic opportunity is an important component of their educational experience and an important ingredient in their selection of schools, "mere creature[s] of the state," which the state cannot do. *Pierce*, 268 U.S. at 535.

TSSAA's acknowledgment that the suppression of speech is in substantial part justified on grounds of competitive equity also indicates that TSSAA's concern is that students hearing a message will act upon that communication – a "primary" not some "secondary" effect of the speech and, as the district court held, a content-based regulation. The suppression of speech because of its possibly successful impact on the listener is foreign to conventional First Amendment doctrine. *See* Petition at 24-25. To the extent that respondents claim that this case should be governed by this Court's narrow campaign-contributions jurisprudence, that makes the case even more, not less, certworthy. *See* BIO at 9-10.

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